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EARLY LAW AND CUSTOM

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DISSERTATIONS ON
EARLY LAW AND CUSTOM

BY SIR HENRY SUMNER MAINE,
K.C.S.I., LL.D., F.R.S.

AUTHOR OF 'ANCIENT LAW,' 'VILLAGE-COMMUNITIES IN THE EAST AND WEST,' ETC.
FOREIGN ASSOCIATE MEMBER OF THE INSTITUTE OF FRANCE

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PREFACE.

TWO COURSES of lectures, delivered by the Author while he had the honour of holding the Corpus Professorship of Jurisprudence in the University of Oxford, have been already published with the titles 'Village-Communities in the East and West,' and 'The Early History of Institutions.' The substance of the present volume was originally contained in lectures which formed part of various other courses given by him at Oxford; but in some cases the form has been materially altered.

The Author continues in these pages the line of investigation which he has followed in former works. He endeavours to connect a portion of existing institutions with a part of the primitive or very ancient usages of mankind, and of the ideas associated with these usages. In his first four chapters he attempts, with the help of the invaluable series of 'Sacred Books of the East,' translated under the superintendence of Professor Max Müller, to throw some light on that close implication of early law with ancient religion which meets the inquirer on the threshold of the legal systems of several societies which have contributed greatly to modern civilisation. In the chapters which follow, he treats of another influence which has acted strongly on early law, the authority of the King. In the later portions of the book he examines certain forms of property and tenure, and certain legal conceptions and legal classifications, which have survived to our day, but which appear to have had their origin in remote antiquity. In a few words at the commencement of his Seventh Chapter, the writer has explained his reasons for prefixing to his later chapters a discussion of some 'Theories of Primitive Society.'

The substance of Chapters V., VI., IX., and XI. has already appeared in the 'Fortnightly Review,' and the bulk of Chapter VIII. in the 'Nineteenth Century;' and the Author has to express his thanks to the proprietors of those periodicals for their permission to republish his contributions.

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EARLY LAW AND CUSTOM.

CHAPTER I.

THE SACRED LAWS OF THE HINDUS.

THE study of the sacred languages of India, which has given to the world the modern science of Philology and the modern theory of Race, began virtually in the study of sacred Indian law. Sir William Jones, who, though he was not absolutely the earliest of Anglo-Indian Sanscritists, was the first to teach the West that there was in the East such a language as Sanscrit, and a literature preserved in it, does not appear during his Oriental studies in England to have suspected the existence of the treasure he was destined to disinter. He seems rather to have sought the key to Eastern knowledge in two spoken and highly-cultivated languages—Arabic and Persian. But he accepted a Judgeship in a Court of Justice newly established in Bengal, under an Act of Parliament which reserved to native litigants the application of their own laws and usages in all questions of inheritance and contract; and, from a much earlier period, it had been the practice of all the Indian Courts to attach to themselves Moolvies and Pundits—that is, native professors of Mahommedan and Hindu law—for the purpose of advising them on the legal rules, of which these experts represented themselves to be the depositaries. The correspondence of Sir William Jones repeatedly expresses his suspicions (perhaps not always quite just) of the fidelity and honesty of the native advisers of the tribunals. 'I can no longer bear,' he writes in September 1785, 'to be at the mercy of our Pundits, who deal out Hindu law as they please, and make it at reasonable rates when they cannot find it ready-made.' He therefore formed a determination to acquaint himself personally with the sources of the law from which they pretended to draw their opinions. With Arabic he was already familiar, and he therefore required no assistance in his studies of Mahommedan law; but for the purpose of mastering the virtually unknown language in which the Hindu law was contained, he found it necessary to visit during his vacations several of the decaying and decayed seats of learning in which knowledge of it was still professed, and he organised a staff of Hindu scholars to aid him in his Sanscrit studies, and to record their results. The plan for improving the administration of Anglo-Indian justice which finally commended itself to him was one for the preparation of a Digest in English of Hindu and Mahommedan law, which should need no Pundits or Moolvies for its interpretation. Much to their honour, the Indian Government of the day, formed of Lord Cornwallis and his Council, accepted his offer to preside over the undertaking, and his staff of native experts, considerably increased, was taken into the Government service. On his monument by Flaxman, in the chapel of University College at Oxford, he sits surrounded by his company of native literates, amid conventional Indian foliage, bareheaded, in the open air.

It was in fact from these native Hindu teachers that Sir William Jones learned, and the learned and curious all over the West were gradually informed, that in a part of the world just coming under the British sceptre there existed an ancient language, the elder sister of the classical languages so honoured in the West, a series of poems which might not unjustly be compared to the Homeric epics and the Attic drama, and laws twice as old as the legislation of Solon and the Twelve Tables of Rome. It is impossible now—now that India has become more commonplace as she has got nearer; now that, here at all events, she is associated with frontier wars, budgets, opium, and grey shirtings—to reproduce the keen throb of intellectual interest which the literary portion of these discoveries sent through Europe. But Sir William Jones was even more of a jurist than a scholar, and nothing seems to have surprised and interested him more than the assurance of his teachers that, in the ancient language he was learning, there survived legal writings asserted to be of sacred origin, of vast antiquity, and of universal obligation among Hindus. The oldest of them was said to have been dictated by Manu, a divine being who had been mysteriously associated with the creation of all things; and it was described as the acknowledged basis of all Hindu law and Hindu institutions, the fountain of all civil obligation to more than a hundred millions of men. The book was actually extant, and the translation of it which he gave to the world, with the title 'Institutes of Hindu Law, or the Ordinances of Menu, according to the Gloss of Cullúca,' was the first-fruits of his labours on the Digest which he had planned. He seems, in fact, to have regarded it as standing to this projected Digest much in the same relation as the Roman Institutes to the celebrated Digest of the Emperor Justinian.

It does not seem to me possible to doubt that the account which Sir William Jones gave of the Book of Manu in his Preface to his translation was a rationalised version of the statements made to him by his native teachers, who seem all to have belonged to one particular school of Hindu learning, accustomed to hold Manu in especial honour. Sir William Jones considered this personage, who, in the treatise called after him, sits 'reclining on his arm, with his attention fixed on one object, the supreme God,' as a real individual human being, and the personal author of the legislation attributed to him. Sir William Jones compares him to the Cretan Minos and the Egyptian Men, partly on account of the consonance of names. As I have just stated, he sees an analogy in this law-book to the Institutes of the Roman Justinian, but he assigns to it the prodigious date of 1,280 years before Christ. In the light of newer knowledge, which nevertheless might not have existed but for Jones, we can see that these statements of his require correction. There is no doubt that, if Manu is to be compared to a book known to Englishmen, it should have been to a book a good deal more familiar to them than the Roman Institutes, the book of Leviticus. For Manu, though it contains a good deal of law, is essentially a book of ritual, of priestly duty and religious observance; and to this combination of law with religion the whole family of Hindu writings, to which the book of Manu belongs, owe some remarkable characteristics on which I am desirous of dwelling. It is not at the same time to be supposed that the combination is peculiar to the Hindus. There is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance. The law of the Romans has been thought to be that in which the civil and Pontifical jurisprudence were earliest and most completely disentangled. Yet the meagre extant fragments of the Twelve Tables of Rome contain rules which are plainly religious or ritualistic :—

> Thou shalt not square a funeral pile with an adze.
> Let not women tear their cheeks at a funeral.
> Thou shalt not put gold on a corpse.

We are told by Cicero ('De Legibus,' 2, 25, 64) that several of these rules contained in the Tenth of the Roman Tables were taken from Greek originals. He attributes the Greek rules to Solon, and explains that they limited the costliness of the ancient ritual of funerals.

The opinions of Sir William Jones produced great effects both in the East and in the West. One result which followed from them I must pass by with notice very unequal to its practical importance. The Anglo-Indian Courts accepted from the school of Sanscritists which he founded the assertion of his Brahmanical advisers, that the sacred laws beginning in the extant book of Manu were acknowledged by all Hindus to be binding on them. The impression in the mind of the English judicial officers—an impression shared, I infer from its language, by the English Parliament—manifestly was that the sacerdotal Hindu law corresponded nearly to the English Common Law, and was at least the substructure of all the rules of life followed by Hindus. It is only just beginning to be perceived that this opinion had a very slender foundation, for it is probable that at the end of the last century large masses of the Hindu population had not so much as heard of Manu,[1] and knew little or nothing of the legal rules supposed to rest ultimately on his authority. The original range of operation which it is possible to allow to the sacerdotal laws has been much narrowed by very recent investigation. Some years ago, on my return from India, I stated in a book on 'Village Communities in the East and West' (pp. 52, 53) the opinion which I had formed after personal inquiry among Indian judicial officers. 'The conclusion,' I said, 'arrived at by the persons who seem to me of highest authority is, first, that the codified law—Manu and his glossators—embraced originally a much smaller body of usage than had been imagined; and next, that the customary rules, reduced to writing, have been very greatly altered by Brahmanical expositors, constantly in spirit, sometimes in tenor. Indian law may in fact be affirmed to consist of a very great number of local bodies of usage, and of one set of customs, reduced to writing, pretending to a diviner authority than the rest, exercising consequently a great influence over them, and tending, if not checked, to absorb them.' Since then, my conclusion has been greatly fortified by more systematic examination of the phenomena. There is in India a province, the Punjab, the country of the Five Rivers, which was the earliest seat of the Aryan Hindus on their descent from their original home into the Indian plains. The laws and institutions of this province have quite lately been the subject of an exhaustive official inquiry ('Punjab Customary Law,' edited by C. L. Tupper, Calcutta, 1881). Among several results of great interest which seem to me to have been reached, one is that we have in the Punjab the Hindu institutions very much in the state in which they were before the Brahmanical expositors took them in hand. The traces of the religious ideas which profoundly influenced the development of what is known as the Hindu law are here extremely slight; and few things can be more instructive to the legal archæologist than the comparison of the Punjab rules with those worked out in Brahmanical schools far to the south-east. This Punjab Hindu law exhibits in fact some singularly close resemblances to the most ancient Roman law. There is also evidence that the stream of Hinduism which at some time or another flowed over the southern peninsula of India was extremely superficial.[2] The southern Hindu has always been regarded as a lax Hindu; but the truth seems to be, not that he negligently violates the Hindu sacerdotal law, but that neither he nor his forefathers ever knew it in anything like its integrity.

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[1] A high authority informs me that there are few, if any, references to Manu in the Sanscrit literature other than the legal treatises. These last quote *a* 'Manu,' but the writings quoted under that name are not those now extant.

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[2] Much attention is deserved by the two works of Mr. J. H. Nelson, *A View of the Hindu Law as administered by the High*

Some other views, which are not now accepted by the most learned Sanscritists, had their origin in the theories first propounded in Sir William Jones's preface. The probable antiquity of Manu's law-book was much exaggerated. Its true date is unknown: in Indian literary history there are almost no trustworthy dates: but it is now believed to be relatively modern—almost the most modern of a large family of Sanscrit writings more or less treating of law. This opinion is the result of a test first applied by Professor Max Müller, and now universally accepted by Sanscritists as conclusive. The law-book of Manu is in verse, and Verse is one of the expedients for lessening the burden which the memory has to bear when writing is unknown or very little used. But there is another expedient which serves the same object. This is Aphorism or Proverb. Even now, in our own country, much of popular wisdom is preserved either in old rhymes or in old proverbs; and it is well ascertained that

Court of Madras, and *The Scientific Study of the Hindu Law*, particularly the first. There may be a question whether the practical evils pointed out in these books are now remediable, or, if they are remediable, by what methods they should be removed: but of their existence I do not think there can be any reasonable doubt.

during the Middle Ages much of law and not a little of medicine was preserved among professions, not necessarily clerkly, by these two agencies. A great deal of old German law compressed into maxims has been preserved, and it is probable that the Latin legal maxims well known to English lawyers, and sometimes spoken of as the quintessence of wisdom, were really aids to recollection. As to Verse, the ordinary medical practitioner once carried his professional knowledge with him in the versified Latin rules of the school of Salerno—that curious body of medical precepts which begins with the grim warning, '*contra vim mortis non est medicamen in hortis.*' In Sir William Jones's day, an abridgment of Lord Coke's 'Reports' in verse was in existence; and he gravely remarks that, if the verse had been smoother and the law more accurate, every student might have been advised to use it. Now, the Sanscrit law-books are sometimes in aphoristic prose, sometimes in verse, sometimes in a mixture of both; and the canon established by Max Müller is that, in India at all events, books of aphorisms are older than books of verse; and the clue being once found, many more proofs disclose themselves that Manu, which is wholly in verse, is much more recent than the Hindu law-books (such as Apastamba and Gautama,[3] which are wholly in aphoristic prose), and even more modern than books (like Vishnu and Vasishtha[4]) which are partly in prose and partly in verse. 'In the whole of Vedic (that is Hindu scriptural) literature,' says Max Müller, 'there is no work written, like Manu, in the regular epic sloka, and the continuous employment of this metre is a characteristic mark of post-Vedic writings.' Manu, therefore, in spite of its great modern reputation, belongs to the Hindu Apocrypha. Nor is it believed that we have the book in its original form. Dr. Jolly (preface to Vishnu) speaks of the 'abundant evidence' for its having undergone modifications and entire transformations in successive periods.

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[3] Apastamba and Gautama are translated in vol. ii. of Max Müller's *Sacred Books of the East*, Vasishtha in vol. ix., Baud-

The result of all this literary investigation and discussion is, that no book has had so many dates attributed to it as the book of Manu. Sir W. Jones placed its age at 1280 B.C., Schlegel at 1000 B.C., Elphinstone at 900 B.C., Monier Williams at about the fifth century B.C., Max Müller at not earlier than 200 B.C. But the high authority of the late Dr Burnell is now cited for so late an age of the original book as 400 A.D., and it has even been attributed in

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hâyana in the same volume, and his most important chapters in West and Bühler's *Digest of Hindu Law*. This writer is regarded by learned Hindus as an extremely old authority, but the extant text is in a very untrustworthy condition, as may be seen from Dr. Bühler's Introduction. Vishnu is translated by Jolly in vol. v. of the *Sacred Books*.

[4] Ibid.

its present form either to the eleventh or the fourteenth century of our era. (See Nelson, 'Scientific Study of Hindu Law,' p. 37.) It is as though it were thought doubtful whether a particular work were composed at the fabulous date of the Taking of Troy, or at the historical date of the Battle of Bannockburn. The book itself, however, purports to be coeval with the creation of the world, and I suppose that a Hindu holding the opinions now considered orthodox would be bound to claim for it an indefinitely high antiquity. At the same time, its audacious pretension to be of divine origin is outdone in some of the writings now shown to be older, for the so-called Code of Vishnu professes to have been dictated by one of the Persons of the Hindu Trinity to the Goddess of the Earth.

When this sacred legal literature of the Hindus is surveyed in its entirety, it is impossible not to recognise the plausibility of the modern theories of its origin. No one treatise, and still less the aggregate of treatises, is the production of an individual man or of an individual mind. The literature is the gradual growth of schools of learned Brahmans, which are still found in India. They are companies or corporations of men devoted to sacred learning. Perhaps the nearest analogy to their work is to be found in the labours of the Benedictines. But the comparison must not be pushed too far. The conception of a celibate order appears to have been unknown to the early Hindus. Each school was either in its beginning an actual family, or, if originally it was a mere collection of voluntary pupils sitting at the feet of a teacher, it tended to shape itself upon the model of the family, as the only known form of permanent association. The distinction between one school and another probably consisted in the particular set of authorities (as it would now be, the particular standard books) which it followed; and, as it went on from generation to generation, it was recruited partly by voluntary adherence and partly by hereditary descent. The double process is clearly reflected in the text of one of our oldest authorities, Apastamba. The student desirous of being initiated into sacred learning is to go to a man 'in whose family it is hereditary, who himself possesses it, and who is devout in following the law' (Apastamba, I. i. 1. 11). On the other hand, the pupil is directed to consider the teachers of his teacher as his ancestors (Apastamba, I. i. 7. 12). This view of the relation of teacher and pupil has by no means died out in India. The Hindus still regard 'a school consisting of a succession of teachers and pupils as a spiritual family' (Dr. Bühler, *loc. cit.*) And according to the letter of the law recognised by the Indian Courts, though not perhaps according to the actual practice, teacher and pupil still inherit from one another, just as they did in the remote days of Apastamba, who lays down that, on failure of the nearer kinsmen, 'the spiritual teacher inherits, and in failure of the spiritual teacher a pupil shall take the deceased's wealth, and use it for religious works for the deceased's benefit, or he may himself enjoy it' (II. vi. 14. 3).

There are analogies to this sacredness and strictness of literary relations in the literary history of two societies with little or no intellectual likeness to the Hindus. Mr. Grote's theory of the Homeric poetry, taken in a mass (ii. 176–178), is that it was the aggregate production, not of one man, but of a *gens* or clan of Homeridæ, of whom Homer was the name-giving ancestor, real or supposed, the 'divine or semi-divine eponymus or progenitor, in whose name and glory the individuality of every member of the *gens* was merged.' 'Homer is no individual, but the divine or heroic father of the Homerids, the ideas of worship and ancestry, coalescing, as they constantly did, in the Grecian mind.' A still nearer analogy is one which, like many others, occurs in the ancient legal literature of the Irish. 'Literary fosterage,' I wrote in a former work ('Early History of Institutions,' p. 242), 'was an institution nearly connected with the existence of the Brehon law schools, and it consisted of the various relations established between the Brehon teacher and the pupils he received into his house for instruction in the Brehon lore.

However it may surprise us that the connection between Schoolmaster and Pupil was regarded as peculiarly sacred by the ancient Irish and as closely resembling natural fatherhood, the Brehon tracts leave no room for doubt on the point. It is expressly laid down[5] that it created the same *Patria Potestas* as actual paternity; and the literary foster-father, though he teaches gratuitously, has a claim through life upon portions of the property of the literary foster-son. Thus the Brehon with his pupils constituted, not a school in our sense, but a true family. While the ordinary foster-father was bound by the law to give education of some kind to his foster-children—to the sons of Chiefs instruction in riding, shooting with the bow, swimming, and chess-playing, and instruction to their daughters in sewing, cutting out, and embroidery—the Brehon trained his foster-sons in learning of the highest dignity, the lore of the chief literary profession. He took payment, but it was the law which settled it for him. It was part of his status, and not the result of a bargain.'

On the whole, few literary theories of modern mintage have more to recommend them than that which Professor Max Müller first gave of the large extant body of Hindu sacerdotal legal writings. They were gradually evolved by Brahmanic families, real or artificial. 'The great number of these writings,' he says in his letter, first printed in Morley's Digest,[6] 'is to be accounted for by the fact that there was not one body of Kalpa-Sutras binding on all Brahmanic families, but that different old families had their own Kalpa-Sutras. These works are still very frequent in our libraries, yet there is no doubt that many of them have been lost. Sutras are quoted which do not exist in Europe, and the loss of some is acknowledged by the Brahmans themselves.' As regards the Manava Dharma Shastra, the Manu translated by Sir William Jones and asserted by his native teachers to be the basis of all sacred Hindu law, it is a late redaction of the legal doctrine of the Manavas, a *gens* or clan called after a Manu frequently mentioned in Sanscrit literature, but mentioned by the writer of the extant book as somebody different from himself. If the old Manu ever composed a law-book (which is doubtful), it would certainly not have been composed in the metre of the extant code.

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[5] The literary foster-father has the power of pronouncing judgment and proof and witness upon the foster-pupil, as has the father upon the son, and the Church upon her tenant of ecclesiastical lands (*Ancient Laws of Ireland*, ii. 349).

The theory upon which these schools of learned men worked, from the ancient, perhaps very ancient, Apastamba and Gautama to the late Manu and the still later Narada, is perhaps still held by some persons of earnest religious convictions, but in time now buried it affected every walk of thought. The fundamental assumption is, that a sacred or inspired literature being once believed to exist, all knowledge is contained in it. The Hindu way of putting it was, and is, not simply that the Scripture is true, but that everything which is true is contained in the Scripture. From very early times, the Hindu doctors appear to have been conscious of difficulties in the interpretation or application of their theory. Sometimes books of authority contradicted one another. Sometimes they failed to supply a basis for received doctrines or for immemorial religious practice. One of the earliest of expedients was to suppose the loss of passages in the most ancient portion of the Scriptures. 'If you ask,' says Apastamba, 'why the decision of the Aryas presupposes the existence of a Vedic passage, then I answer, All precepts were originally taught in the Brahmanas, but these texts have been lost. Their former existence may, however, be inferred from usage. It is not, however, permissible to infer the former existence of a Vedic passage where pleasure is obtained by following the custom; he who follows such usage becomes fit for Hell' (I. iv. 12. 10) With the aid of such expedients, of which several are still in use among learned Hindus, the theory has survived; and it is to be observed that such a theory, firmly held during the infancy of systematic thought, tends to work itself into fact. As the human mind advances, accumulating observation and accumulating reflection, nascent philosophy and dawning science are read into the sacred literature, while they are at the same time limited by the ruling ideas of its priestly authors. But as the mass of this literature grows through the additions made to it by successive expositors, it gradually specialises itself, and subjects, at first mixed together under vague general conceptions, become separated from one another and isolated. In the history of Law the most important early specialisation is that which separates what a man ought to *do* from what he ought to *know*. A great part of the religious literature, including the Creation of the Universe, the structure of Heaven, Hell, and the World or Worlds, and the nature of the Gods, falls under the last head, what a man ought to know. Law-books first appear as a subdivision of the first branch, what a man should do. Thus the most ancient books of this class are short manuals of conduct for an Aryan Hindu who would lead a perfect life. They contain much more ritual than law, a great deal more about the impurity caused by touching impure things than about crime, a great deal more about penances than about punishments. They are intended to guide the faithful Hindu of the three higher castes from birth to death.

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[6] Now to be read at p. 1 of the Introduction to Apastamba, in vol. ii. of the *Sacred Books*.

and give him full directions for living *first* as a student of holy books, *next* as a householder (or, as we should say, a citizen), and finally—for that is assumed to be the proper lot of every man in old age—as a religious ascetic or a hermit.[7]

This remarkable distribution of life runs through the whole series of sacred legal writings, and only disappears when they become mere law-books. The Brahman alone teaches, but the entire youth of the three higher castes, Brahmans, Kshatriyas, and Vaisyas, come and sit at his feet to be instructed in sacred learning; it is not even certain from some passages whether the lowest and most despised of castes, the Sudras, are always excluded. This is the period of Studentship. When it comes to an end, the instructed Hindu returns to his family and to civil affairs. He is then the Householder. But, when old age is beginning, it is assumed in these books (whatever may have been the actual practice) that he withdraws from active life and closes his days as a Hermit or Ascetic, following a code of self-denial which is prescribed for him in full detail. It is of course to the second of these periods, that of life as a Householder, that we must look for whatever light the sacred laws of the Hindus may throw upon the ancient history of law. The first of them, Studentship, is remarkable, as disclosing the true secret of the hold of the sacred literature on large portions of the Hindu race, and of the respect paid by it to the teachers of the race, the Brahmans. For the education of the young Hindu is not merely an education in the holy texts and doctrines; it is a training in reverence, almost amounting to abject servility, bestowed on the literature and its professors in about equal proportions and inculcated by a system of rules adapted with extreme skill to immature minds. The third period, however, that of Asceticism, is the one which on the whole seems most unintelligible to the modern reader of these books, and it merits some special attention before this chapter is closed. The duty of adopting the ascetic life, and the rules for following it, referred to in all the law tracts, are discussed at much length by Manu in the sixth chapter. 'Having thus remained,' it is written, 'in the order of Householders, let the twice-born man ("twice-born," that is, through the study of the Vedas), who has before completed his studentship, dwell in a forest, his faith being firm and his organs wholly subdued. When the father of a family perceives his muscles become flaccid and his hair grey, and sees the child of his child, let him then take refuge in a forest. Abandoning all food eaten in towns, and all his household utensils, let him repair to the lonely wood, committing the care of his wife to his sons, or accompanied by her, if she choose to attend him . . . Let him be constantly engaged in reading the Vedas, patient of all extremities . . . Let him bear a reproachful speech with patience; let him not, on account of this frail and feverish body, engage in hostility with any one living. With an angry man let him not in his turn be angry; abused, let him speak mildly; nor let him utter a word referring to vain illusory things . . . Delighted with meditating on the Supreme Spirit, sitting fixed in such meditation, without needing anything earthly, without any companion but his own soul, let him live in this world, seeking the bliss of the next . . . A gourd, a wooden bowl, an earthen dish, or a basket made of reeds, has Manu, son of the Self-existent, declared fit vessels to receive the food of men devoted to God.'

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[7] The Student, who had completed his novitiate, might at any time become an Ascetic, but the regular course of life is that indicated in the text.

It is still a comparatively common practice in India for the aged Hindu to retire into 'religion,' and the law, as administered by the British tribunals, makes provision in many places for the case of a Hindu who has embraced a religious life, and ceased to participate in any kind of secular business. There is nothing by itself surprising in the custom, considering the tremendous series of experiences which the devout believer in Hinduism is led to expect as awaiting him at the moment of his death. Nevertheless, there is reason for thinking that the withdrawal of the aged from activity is more ancient than the Hindu theological system, and has existed independently of it, as a secular practice, in many early societies. The Patria Potestas, which is witnessed to by the ancient law or custom of so many communities, was founded on power quite as much as on parentage; and when the power fails, there are many signs that the patriarchal authority departs. In the Hindu law of Succession, death is not by any means necessarily the occasion of inheritance; the contingency quite as commonly contemplated is withdrawal from secular life; the householder quitting his family and dividing his substance among his children—nay, being even liable (though this is a violently disputed point) to be forced into retirement by his sons. There is some evidence, moreover, that, when the larger associations of Hindu kindred, the Joint Families, were in a more ancient state than that in which we see them, they recognised three classes of persons as entirely helpless and therefore dependent on the group at large; the children, the unmarried daughters and widows, and the old men. The 'seniors' not infrequently mentioned in the Irish Brehon law, and stated to be persons for whom the sept must make provision, are no doubt aged men.

There is reason, in fact, to believe that at some period of human history a revolution took place in the status of aged men, not perhaps unlike that which is still proceeding in the case of women. There is abundant testimony that tribes, long pressed hard by enemies or generally in straits for subsistence, systematically put their members to death when too old for labour or arms. The place from which a wild Slavonic race compelled their old men to leap into the sea is still shown. And the fiercer savage has often in many parts of the world made food of them. Nevertheless, the ancient records of many communities, especially those of Aryan speech, show us old age invested with the highest authority and dignity. Mr. Freeman (in his 'Comparative Politics,' pp. 72, 73) has given a long list of honorific names belonging to classes or institutions, which indicate the value once set by advancing societies on the judgment of the old. Among them are, Senate, *γερουσία* (the Spartan Senate), *δημογέροντες* (its Homeric equivalent), *πρέσβεις* (Ambassadors), Ealdorman, Elder, Presbyter, Monseigneur, Seigneur, Sire, Sir, and Sheikh; and Mr. Freeman closes with the Old Man of the Mountain. So great a number of titles, civil and ecclesiastical, are evidence of a very strong sentiment, and suggest that this exaltation of old age was a definite stage in the ascent to civilisation.

There is a story of a New Zealand chief who, questioned as to the fortunes of a fellow-tribesman long ago well known to the enquirer, answered, 'He gave us so much good advice that we put him mercifully to death.' The reply, if it was ever given, combines the two views which barbarous men appear to have taken at different times of the aged. At first they are useless, burdensome, and importunate, and they fare accordingly. But at a later period a new sense of the value of wisdom and counsel raises them to the highest honour. Their long life comes to be recognised as one way of preserving experience. The faculty of speech, which separates man from the brute, and the art of writing, by which the society capable of civilisation is distinguished from the society condemned to permanent barbarism, are simply methods by which experience is enlarged, compared, and transmitted, and by which mankind is enabled to have more of it than is contained in single separate lives. Yet the individual life is always the original source of experience, and at some time or other it must have been perceived that the more the individual life was prolonged, the larger was its contribution to the general stock. This seems the best explanation of the vast authority which, in the infancy of civilisation, was assigned to assemblies of aged men, independently of their physical power or military prowess. It probably sprang up among communities which had no writings to learn from, and who were conscious that the importance of the arts which were necessary for their very existence was out of all proportion to the average shortness of life. Almost everywhere in the advancing portions of the ancient world we find that the old, generally organised in assemblies, had a large share of the public powers, and there is a survival of these ideas in the minimum limit of age which has been made the condition of a seat in the artificial Second Chambers which have been constructed over most of the civilised West as supposed counterparts of the English House of Lords. But these modern Second Chambers reverse to a great extent the functions of the ancient assemblies, known, from their names and otherwise, to have originally consisted of old men. The Second Chamber is nowadays assumed to have a veto in the legislation of the Chamber which has the initiative; but the ancient Senates, in their primitive condition at all events, decided beforehand what measures should be submitted to the Popular Assembly, and if they legislated themselves, their enactments had reference to special departments of State, such as religion and finance. On the whole, they were rather administrative than legislative bodies. The nearest analogy to the very important control over the law-making power which they once possessed, must be sought in the indefinite but most real and effective authority which an English Cabinet enjoys through its virtual monopoly of the initiative in legislation.

CHAPTER II.

RELIGION AND LAW.

THE most ancient of the books containing the sacred laws of the Hindus appear to me to throw little light on the absolute origin of law Some system of actual observance, some system of custom or usage, must lie behind them ; and it is a very plausible conjecture that it was not unlike the existing very imperfectly sacerdotalised customary law of the Hindus in the Punjab. But what they do show is, if not the beginning of law, the beginning of lawyers. They enable us to see how law was first regarded, as a definite subject of thought, by a special learned class ; and this class consisted of lawyers who were first of all priests. There are signs of the ancient identity of the two professions in the earliest recorded usages of several races, Celts, Romans, and Greeks. Nobody, for example, will understand the ancient Roman lawyer, with that obstinate adherence of his to texts which has characterised his profession during so many centuries, and that method of stating his facts in inflexible formulas which has only just died out in this country, unless it is realised that the jurisconsult sprang from the pontiff or priest. All through the Middle Ages the lawyer who was avowedly a priest held his own against the lawyer who professed to be a layman; and ours is the only country in which, owing to the peculiar turn of our legal history, it is difficult to see that, on the whole, the canonist exercised as much influence on the course of legal development as the legist or civilian. If the Roman Empire had merely transmitted its administrative system to Western Europe, and if it had not bequeathed to it a coherent body of codified secular law making considerable approach to completeness, it is very doubtful whether the general law of the West would not even now reflect a particular set of religious ideas as distinctly as the Hindu law reflects the sacerdotal conceptions of the Brahmans.

It is necessary, first of all, to observe how the priestly character of the Brahmanical authors of the law-books affected their view of *conduct*, a word which must be used at the outset in preference to 'law.' Shortly, this view is intimately affected throughout by their belief as to the lot which awaits human beings after death. This lot will be made up of various experiences, some of which correspond to direct reward or punishment in Heaven or Hell, as conceived by the Western religions. But the Hindu belief concerning the posthumous state of man, and the Buddhist belief which has mainly sprung from it, differ from the most widely diffused Western beliefs in that the Transmigration of Souls fills as large a space as direct reward and punishment, and in that rewards and punishments in all their forms are regarded, not as eternal, but as essentially transitory. It is beside my purpose, I should observe, to consider what may have been the most ancient faith or faiths of the Hindus, and still more how far the religious ideas reflected in the books before us represent their existing religious doctrine. In the works of which I have been speaking, the early manuals of law, belief has reached a definite stage, which may be examined by itself and which seems to me extremely instructive. Hindu theology, from very remote times, appears to have regarded the universe as having been destroyed and again created, and as destined to be destroyed and again created; but during the enormous intervals between these destructions and creations the aggregate of existence is conceived as indestructible and as incapable of increase or diminution. The sum of life, in particular, is always constant. This essence, life or soul, is regarded as running in a continuous stream through all animate, perhaps we might say through all organic, nature; but it is always returning on itself—never ending, still beginning. This stream of life is divided into portions or parcels, which are temporarily detained in external forms, but which are constantly passing from one form to another without losing their identity. Men, animals, holy sages, and the gods themselves, are not essentially different from one another. The same life or soul pervades them all, clothing itself in one form after another. Existence itself does not end, but its successive stages are terminable and transitory. When a man still contaminated by impurity dies, his spirit passes through a series of purgatories ; from the last of these it escapes to clothe itself with one animal shape after another, and at last it finds embodiment in a human frame, which at first will probably be frail or sickly. But, after a second birth through the study of the Scriptures, the virtuous at death pass straight into Heaven, where their stock of virtue will keep them for long ages; but it will gradually wear out, until some remnant of it carries them back to earth, to reappear among the prosperous and the powerful. 'Men of all castes, if they fulfil their assigned duties, enjoy in Heaven the highest imperishable bliss. Afterwards, when a man who has fulfilled his duties returns to this world, he obtains by virtue of a remainder of merit birth in a distinguished family, beauty of form, beauty of complexion, strength, aptitude for learning, wisdom, wealth, and the gift of fulfilling the laws of his caste or order. Therefore in both worlds he dwells in happiness, rolling like a wheel from one world to the other' (Apastamba, II. i. 2. 2 and 3). Even the gods in Heaven, who are looked upon as not much more than men of extraordinary virtue, will in time exhaust their store of merit and pass out of blessedness. 'It is by favour of the Brahmans,' says Vishnu (XIX. 22), 'that the gods reside in Heaven.'

The Wheel mentioned in the above passage from Apastamba is a favourite image with these writers. They figure existence as a wheel spinning round. Religious pictures, representing the circle of life with its various compartments, with Heaven at the top and Hell at the bottom, and with human and animal existence at the sides, are common in the East; but though they are not unknown to Hindus, they are more frequently found among Buddhists,[1] who must have borrowed the symbol of the Wheel from an older Hinduism, and who appear to attach to it a special spiritual significance. In the Buddhistic Wheel-pictures, Buddha is depicted outside the circumference, in the attitude of benediction. He only has escaped from the weary cycle of existence, and stands alone in Nirvana, apart from gods and men. The assumption of such a possibility would doubtless be regarded by orthodox Hindus as atheistic. Exalted religious feeling takes with them the form of meditation on Brahma, the Atman, the Infinite, the

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[1] See Note A at the end of this chapter, 'Wheel-pictures.'

Self-Existent, the 'immortal and spotless,' who 'lies enveloped in matter and is the dwelling of all living creatures,' who is, 'like a city, divided into many streets.' Here and there they express themselves on this topic in language of much sublimity.

I shall have occasion to explain in the next chapter that one particular religious system of the greatest antiquity which is shadowed forth in these books stands quite apart from the beliefs which I have been examining. It is very probable that these beliefs were themselves compounded of divers more ancient parts, and that direct reward or punishment, and indirect reward or punishment by transmigration, did not originally belong to the same body of doctrine. Heaven and Hell and the Transmigration of Souls are, however, all referred to in the oldest of the law treatises, though briefly and slightly. In the more recent writings (some of them, however, not so modern as Manu) these subjects occupy a great space, and have been vastly amplified by gloomy and fantastic imagination. Heaven, as is not unusual in religious systems, is but faintly sketched; but the Hells, or, as they would more properly be called, the Purgatories (since they are essentially transient), are described with the utmost minuteness of detail. They are twenty-two in number, each applying a new variety of physical or moral pain. It would be a mistake, I think, to suppose that they were created by a single imaginative effort, like the circles of Dante's Inferno. They rather belong to widely separated grades of the conception of punishment. Such places of retribution as the twenty-first of these Purgatories, where souls wander in sword-leaved forests ; the nineteenth, where they stray over rough and uneven roads ; the fifteenth, where they sink in stinking clay, are probably much older than the first, or place of darkness ; the fourth, or place of howling ; or the places of burning, parching, and pressing together, which stand tenth, eleventh, and twelfth. These last seem to me not older than the infliction of regular (but originally very cruel) criminal punishments by civil rulers possessing organised authority. The torture chambers of princes have very strongly influenced the conception of posthumous punishment, as may be seen by comparing what remains of some of them—for example, of that in the free city of Nuremberg—with a picture in which some painter of the fourteenth century gives form to the popular ideas concerning Purgatory and Hell.

The sojourn of the sinful soul in each of these places of punishment is, as I have said, always terminable, but its length is expressed in language suited to astronomical magnitudes. If, for example, a Brahman be slain, as many as are the pellets of dust which his blood makes on the soil—that is to say, on the burnt-up soil of India—so many are the periods of a thousand years the slayer must pass in Hell (Manu, XI. 208). The duration of punishment is imagined by the Buddhists with even greater extravagance; and indeed on all these subjects they seem to have outdone the doctrine of the Hindus. The frightful Buddhist pictures of torments in hell are tolerably well known. They are mostly of Chinese origin, and probably exaggerate (but do not more than exaggerate) the criminal justice administered from time immemorial in the great organised Chinese Empire and its dependent kingdoms, in which the highest importance seems always to have been attached to the deterrent effects of punishment.

The series of Purgatories is, however, at last worked through, and the soul or portion of life emerges to begin a course of transmigration which may bring it again to humanity. I have already stated my opinion that the purgation of sin or impurity by transmigration, and its purgation by punishment in hell, did not originally belong to the same system of religious thought. But in these Hindu law-books they are blended together; and the sinful spirit, released from purgatorial pains, has still to pass through a succession of animal or vegetable forms before it is again clothed with a human body. It is hard not to smile at the grotesque particularity of detail with which such writers as Vishnu and Manu depict the transmigration of souls. 'Criminals in the highest degree enter the bodies of all plants successively. Mortal sinners enter the bodies of worms or insects. Minor offenders enter the bodies of birds. Criminals in the fourth degree enter the bodies of aquatic animals. Those who had committed a crime affecting loss of caste enter the bodies of amphibious animals' (Vishnu, XLIV. 2). These general statements are followed by a prodigious number of others, mentioning the class of creature into which particular sinners enter. There is perhaps a natural fitness in some of them, but others look like arbitrary assertions or wild guesses. One who has appropriated a broad passage becomes a serpent living in holes. One who has stolen grain becomes a rat. One who has stolen water becomes a water-fowl. But what is to be said of the transformation of the stealer of silk into a partridge; of the thief of linen into a frog; of the cattle-stealer into an iguana? I may venture at the same time to suggest that what seems to us most difficult to understand in these beliefs once appeared simple and natural. It has been observed that savages look upon the transmutation of one creature into another as almost an easy, everyday process. Primitive men, living constantly in the presence of wild animals, preying on them and preyed upon by them, do not seem to have been struck by the immense superiority of the man to the brute. They appear to have been impressed by the difference between living things and everything else, but to have considered the forms of animate being as separated from one another by a very slight barrier. Some very interesting inferences have recently been drawn from this savage characteristic; and it has been pointed out how in those survivals of a very ancient world, fairy tales and myths, one creature is constantly changing into another, and slipping back into its original shape. The most popular child's book of our day is a story of metamorphosis ; but that story of Wonderland owes its popularity to its faithfully following the operations of a dream ; and one must here remark that much of the material of ancient superstition is literally such stuff as dreams are made of.

But these Hindu law-books have wrought up the ancient belief into a moral and theological philosophy of the greatest precision and amplitude. Their special principle is that man's acts and experiences in one form of being determine the next. Whether he will in a future existence become a plant, a reptile, a bird, a woman, a Brahman, or a semi-divine sage, depends on himself. He goes out of the world what his own deeds have made him ; and the impossibility of dissociating the past from the future is declared by these writers in language of much solemnity. If a man departs modified by voluntary sinfulness or involuntary impurity, and if he has not expelled the taint by due penance, he will become one of the lowest creatures ; if he dies purer than he was born, he may reach the highest stage of humanity or become indistinguishable from divinity. The whole theory is saved from contempt by its power of satisfying moral cravings, and by the apparently complete explanation which it offers of the unequal balance of good and evil in this world. The last King of Burmah had been a monk before he ascended the throne, and he remained to his death an eminent Buddhist theologian. An Englishman was lecturing him on the military, scientific, and commercial superiority of the English to the Burmese, not without some intention of hinting that this pre-eminence was due to the purer faith of his countrymen. The king politely assented, but added, 'There is no doubt that you must all have been very virtuous Buddhists in some former state of existence.'

With these explanations, some features of those writings which are at first sight very perplexing become comparatively intelligible. Thus, they are chiefly called law-books because they contain *rules of conduct* stated with the utmost precision. But what happens to a man if he disobeys the rule? This is the principal question to the modern jurist. What is the punishment, or, as the technical phrase is, the Sanction? Understood in the modern sense, it is hardly noticed in the oldest of these books. It is in fact to be inflicted in another state of existence, and therefore, though it may be asserted, no directions can be given about it. Thus the place which in a modern law-book is taken by the Sanction—that is, by the various penal consequences of refusing to obey a law—is taken in these writings by Penances. You are to punish yourself here, lest a worse thing happen to you elsewhere. These penances are set forth in the most uncompromising language and in apparent good faith.[2] In one place, the penitent is told to mutilate himself and to walk on in a particular direction till he drops dead. In another he is to throw himself three times into the fire, or to go into battle and expose himself as a target to the enemy. For one great crime he is to extend himself on a red-hot iron bed, or to enter a hollow iron image, and, having lighted a fire on both sides, to burn himself to death. For the comparatively venial offence of drinking forbidden liquor a Brahman is to have boiling spirit poured down his throat. Other penances are extraordinary from the length and intricacy of the self-inflictions which they suppose. The old books hint a doubt here and there as to the efficacy of penance: what good can it do, they say, since the evil deed itself remains; still, they add, the authoritative opinion is, that the penance should be performed. 'Man in this world,' writes Gautama (xix. 2), 'is polluted by a vile action, such as sacrificing for men unworthy to offer a sacrifice, eating forbidden food, speaking what ought not to be spoken, neglecting what is prescribed, practising what is forbidden. They (*i.e.* some Brahman authorities) are in doubt if he shall perform a penance for such a deed or if he shall not do it. Some declare that he shall not do it, *because the deed shall not perish.* (But) the most excellent opinion is that he shall perform a penance.' This opinion is then supported by copious quotations from the Hindu scriptures. The remarkable thing is, that no one of these writers seems to feel, what would be our doubt, whether anybody could be got to perform the severer penances.

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[2] Apastamba, I. i. 15; Gautama, XXII.; Vishnu, XXXIV. XXXV.

How then does what we should call Law—that is, law, civil or criminal, enforced by sanctions or penalties to be inflicted in this world—first make its appearance in these books? It appears in connection with the personage whom we call the King. His authority is more or less assumed to exist in the oldest of these treatises, but, all taken together, they suggest that the alliance between the King and the Brahmans was very gradually formed. The most ancient of the books give comparatively narrow place to the royal authority, but the space allotted to the King and his functions is always increasing, until in the latest treatises (such as Manu) the whole duty of a King is one of the subjects treated of at the greatest length and with the greatest particularity. It may be observed that, with the increased importance attributed to the King, there is a change in the sacerdotal view of his relation to the law. In what appear to me to be the most ancient portions of these books, the King is only represented as the auxiliary of the spiritual director. He is to complete and enforce penances. 'If any persons,' says Apastamba (II. v. 10. 13), 'transgress the order of their spiritual director, he shall take them before the King. The King shall consult his domestic priest, who should be learned in the law and in the art of governing. He shall order them to perform the proper penance, if they are Brahmans, and reduce them to reason by forcible means, except corporal punishment and servitude, but men of other castes, the King, after examining their actions, may punish even by death.' In a later treatise (Vishnu, III. 2) the duties of a King are summed up in two rules: he is to protect his people; he is to keep the four castes, and the four orders of Student, Householder, Hermit, and Ascetic, in the practice of their several duties; or, in other words, he is to enforce the whole social and religious system as conceived by the sacerdotal lawyers. The further progress of change consists in the further exaltation of the personage who in the passage from Apastamba is called the King's domestic priest. In the end, the law-books come to contemplate an ideal tribunal composed of the King, with learned Brahmans as assessors. The later writings clothe the King with right divine. He is formed of eternal particles drawn from the substance of the gods. 'Though even a child, he must not be treated lightly, from an idea that he is a mere mortal. No ; he is a powerful divinity who appears in human shape' (Manu, VII. iv. 8). But he has lost in actual personal power. He can only act with the advice of his Brahman assessors. 'Just punishment cannot be inflicted by an ignorant and covetous King, who has no wise and virtuous assistants, whose understanding has not been improved, and whose heart is addicted to sensuality. By a King, wholly pure, faithful to his promise, observant of the Scriptures, with good assistants and sound understanding may punishment be justly inflicted' (Manu, VII. xxx. 31).

From this point the law set forth in these treatises becomes true civil law, enforced by penalties imposed in this world by the Court itself. The Brahmans themselves no doubt from first to last claim a considerable benefit of clergy. 'Corporal punishment,' it is written, 'must not be resorted to in the case of a Brahman ; he at most can have his crime proclaimed, or be banished, or be branded.' At the same time the abstract doctrine of punishments or penal sanctions found in Manu (VII. 17 *et seq.*) might satisfy the English jurists who make the sanction the principal ingredient in a law, so uncompromisingly is it declared. Jeremy Bentham could hardly complain of such language as this : 'Punishment governs all mankind; punishment alone preserves them; punishment wakes when their guards are asleep; if the King punish not the guilty, the stronger would oppress the weaker, like the fish in the sea. The whole race of man is kept in order by punishment; gods and demons, singers in heaven and cruel giants, birds and serpents, are made capable by just correction of their several enjoyments' (Manu, *loc. cit.*). The full consequences of juridical doctrine like this do not, however, appear in such a law-book as the extant Manu, which, besides a great deal of civil law, contains a mass of sacerdotal rules, mostly, as it seems to me, in a state of dissolution and decay. A still later treatise, Narada,[3] is almost wholly a simple law-book, and one of a very interesting kind. The ancient Brahmanical system has been toned down and tempered in all its parts by the good sense and equity of the school of lawyers from whom this book proceeded. The portions of it which deal with Evidence appear to me especially remarkable, not only for the legal doctrine, which (though the writer believes in Ordeals) is on the whole extremely modern, but for the elevation of moral tone displayed in its language on the subject of true and false witness, which should be set off against the unveracity attributed to the modern Hindu. 'No relatives, no friends, no treasures, be they ever so great, are able to hold him back who is about to dive into the tremendous darkness of Hell. Thy ancestors are in suspense when thou art come to give evidence, and ponder in their mind, "Wilt thou deliver us from Hell or precipitate us into it?" Truth is the soul of man; everything depends upon truth. Strive to acquire a better self by speaking the truth. Thy whole lifetime, from the night in which thou wert born up to the night in which thou wilt die, has been spent in vain if thou givest false evidence. There is no higher virtue than veracity; nor is there a greater crime than falsehood. One must speak the truth, therefore, especially when asked to bear testimony (Narada, pp. 42, 43, Jolly). The somewhat analogous passage in Manu (VIII. 112) is defaced by the often reprobated qualification, 'In case of a promise made for the preservation of a Brahman, it is no deadly sin to take a light oath.'

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[3] The 'Institutes of Narada' have been translated into English by Dr. Julius Jolly. London: Trübner & Co., 1871.

The difficulties under which the student of the so-called Sacred Laws of the Hindus has so long laboured have been almost entirely caused by the transitional character of the book which was first introduced to European scholarship as the original source of Hindu Law. If the sample of this branch of Hindu literature first translated into a Western language had been Narada, it would have been regarded as a law-book of a familiar type, and the traces of sacerdotal influence which are to be found in it would probably have been neglected. If, on the other hand, the book first made accessible had been Gautama, or Baudhâyana, or Apastamba, it would probably have been set down at once as a manual of practical religious conduct, the Whole Duty of a Hindu; the law contained in it would probably have been considered adventitious or accidental. But Manu, which Sir William Jones made famous in Europe, neither falls wholly under the one description nor wholly under the other. And so long as it stood by itself there was the greatest difficulty in determining its place in the general history of law. A good many years ago ('Ancient Law, pp. 17, 18, 19), I showed the hesitation I felt in making use of it for archæological purposes; but I can now see that I underrated the sacerdotal element in the structure of Manu. The whole of the literature to which it belongs sprang, it would now appear, from a double origin; in part from some body of usage, not now easy to determine (though the recent investigation of local bodies of Indian custom has thrown some light upon it), but chiefly from the Hindu scriptural literature. The last exercised by far the most important influence. Its creators, far back in antiquity, did not start with any idea of making or stating law. Beginning with religious hymnology, devotional exercises, religious ritual, and theological speculation, some of their schools were brought to Conduct, and to stating in detail what a devout man should do, what would happen to him if he did it not, and by what acts, if he lapsed, he could restore himself to uprightness. Gradually there arose in these schools the conviction that, for the purpose of regulating Conduct by uniform rules, it was a simpler course to act upon the rulers of men than on men themselves, and thus the King was called in to help the Brahman and to be consecrated by him. The beginning of this alliance with the King was the beginning of true civil law.

Nothing which thus happened seems to me to be very unlike what would have happened in the legal history of Western Europe, if the Canonists had gained a complete ascendency over Common Lawyers and Civilians. The system which they would have established might be expected to give great importance to the purgation of crime by penances. This in fact occurred ; the preference of the ecclesiastical system with its penances over the secular system with its cruel punishments, had much to do, as may be seen from the legendary stories, with the popularity of St. Thomas (Becket). Then it would be probable that, in the case of graver sin, the ecclesiastical lawyer would invoke the aid of the secular ruler to secure the proper expiation ; and this again occurred in the form of entrusting the severer punishments to the secular arm Finally, if the sole advisers and instruments of the European King in the administration of civil and criminal justice had been ecclesiastics, they would have been driven in the long run to construct a system of civil and criminal law with proper sanctions enforced by the Courts. But the system would have been deeply tinged in all its parts with ecclesiastical ideas, and though it would possibly have borrowed some or many of its rules from older usage, it would have been very hard to detect their sources and their precise original form.

Here we have one of the chief drawbacks on the historical usefulness of the sacred Hindu laws. In the course of their growth they have probably absorbed much customary law from without; but even in the earliest of them it probably has been changed in transmission, while in the latest it may have been borrowed from several different bodies of usage, irreconcilable in the principles from which they start. On the whole, the most valuable portions of the literature are those which throw light on the derivation of certain branches of law from a set of entirely religious beliefs. One example of this derivation will be discussed in the next chapter.

I said that this ancient literature threw less light on the beginning of law than on the beginning of lawyers. But it is of course to be understood that the men who conceived and framed it were much more than lawyers. All the world knows that they were also in some sense priests; but they were much more than priests. What we have to bring home to ourselves is the existence in ancient Indian society of a sole instructed class, of a class which had an absolute monopoly of all learning. It included the only lawyers, the only priests, the only professors, the sole authorities on taste, morality, and feeling, the sole depositaries of whatever stood in the place of a science. These books are one long assertion that the Brahmans hold the keys of Hell and Death, but they also show that the Brahmans aimed at commanding a great deal more than the forces of the intellect, and that all their efforts came to be directed towards bringing under their influence the mighty of the earth of another sort, the conquering soldier and the hereditary king. They were to become partners with princes in their authority, their advisers and assessors. 'A King and a Brahman deeply versed in the Vedas, these two uphold the moral order of the world'; thus it is written in one of the oldest of the books. Doubtless, the alliance between Brahman and King was often sealed, and produced great effects; for, amid the obscurities of early Indian history, the fact does seem to emerge that, although religions doubtless at first extended themselves by conversion, they were established over wide areas and again overthrown much less by propagandism than by the civil power. On the whole, the impression left on the mind by the study of these books is, that a more awful tyranny never existed than this which proceeded from the union of physical, intellectual, and spiritual ascendency. At the same time it would be altogether a mistake to regard the class whose ideas are reflected in the literature as a self-indulgent ecclesiastical aristocracy. It is not easy, I must admit, to describe adequately the intensity of the professional pride which shows itself in all parts of their writings. Everybody is to minister to them; everybody is to give way to them; the respectful salutations with which they are to be addressed are set forth with the utmost minuteness. They are to be free of the criminal law which they themselves prescribe. 'A Brahman,' writes Gautama, 'must not be subjected to corporal punishment, he must not be imprisoned, he must not be fined, he must not be exiled, he must not be reviled or excluded (from society).' Their arrogance perhaps reaches the highest point in a passage of the law-book of Vishnu, where it is written that 'the Gods are invisible deities; the Brahmans are visible deities. The Brahmans sustain the world. It is by favour of the Brahmans that the Gods reside in Heaven.' Yet the life which they chalk out for themselves is certainly not a luxurious and scarcely a happy life. It is a life passed from first to last under the shadow of terrible possibilities. The Brahman in youth is to beg for his teacher; in maturity, as a married householder, he is hedged round with countless duties, of which the involuntary breach may consign him in another world to millions of years of degradation or pain ; in old age, he is to become an ascetic or a hermit. It is possibly to this combination of self-assertion with self-denial and self-abasement that the wonderfully stubborn vitality of the main Brahmanical ideas may be attributed. As I have shown, the sacerdotal *legal* system, as a system, owes probably much of its present authority to its adoption by the Anglo-Indian Courts of Justice as the common law of India ; but some of the points of belief which underlie it, as they do the whole Brahmanical literature, make the most durable part of the mental stock of every Hindu. Some of these ideas are not wanting either in religious or in moral elevation ; but on the whole the evil has prevailed over the good. We can find in this most ancient literature the germs of many superstitions still exercising pernicious effect—of the caste prejudice which forces the wounded Sepoy to die of fever rather than take water from his low-caste fellow-soldier or his English officer ; of that terror of pollution which, twenty-five years since, led to the frightful mutiny of the mercenary troops ; of that rejection of meat and drink which still limits the food supply of an over-populated country, and contributes to its periodical famines. But in close contact with this frame of mind there is nowadays an ever-growing body of thought stirring with the leaven of Western knowledge and Western scientific method; and the juxtaposition of the two makes the government of India by the English an undertaking without a parallel in its novelty and difficulty, and in the amount of caution, insight, and self-command demanded from its administrators.

NOTES AND ILLUSTRATIONS.

NOTE A.

WHEEL-PICTURES.

BUDDHIST wheel-pictures are, as I have said, commoner than those of the Hindus, and have been frequently figured. Mr. Grant Duff's kindness has, however, supplied me from Madras with two Hindu pictures of the class, less perfect in outline than the Buddhist wheel-pictures, but manifestly following the same model.

I am indebted to Professor Cowell for the following curious legendary account of the origin of the Buddhist pictures :—

'In the twenty-first story of the Northern Buddhist collection of legends called the "Divyávadána," there is an account how Buddha's disciple, Maudgalyáyana, used occasionally to visit heaven and hell, and when he returned to earth he would describe the different sights which he had seen.

'Buddha said to Ánanda, "Maudgalyáyana will not always be present, nor one like Maudgalyáyana ; therefore a wheel must be made with five divisions and placed in the chamber of the gate." The mendicants heard that Buddha had given this order, but they did not know what sort of a wheel was to be made. Buddha said, "Five paths are to be made—those in the hells, animals, pretas,[1] gods and men. Of these the hells are to be made lowest; then the animals and pretas; and above, the gods and men—i.e. the four continents, viz., Púrvavideha, Aparagodáníya, Uttarakuru, and Jambudvípa. In the centre are to be made desire, hatred and stupid indifference:[2] desire in the form of a dove, hatred in that of a snake, stupid indifference in that of a hog. And images of Buddha are to be made pointing out the circle of Nirváṇa. Beings are to be represented as being born in a supernatural way, as by the machinery of a water-wheel, falling from one state and being produced in another. All round is to be represented the twelve-fold circle of causation[3] in the regular and in the reverse order. Everything is to be represented as devoured by Transitoriness, and the two gáthás are to be written there,—

Begin, come out, be zealous in the doctrine of Buddha,
Shake off the army of death as an elephant a hut of reeds.
He who shall walk unfaltering in the Doctrine and Discipline,[4]
Leaving behind birth and mundane existence, shall make an end of pain.

'The mendicants carried out Buddha's words, and made the wheel with five divisions. The Brahmans and householders came and asked, "Sir, what is this engraved here?" They reply, "Sirs, even we do not know." Buddha said, "Let a certain mendicant be appointed to stand in the chamber of the gate, who shall show it to all the Brahmans and householders who come from time to time."'

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[1] Ghosts or goblins who suffer from perpetual hunger.
[2] The well-known three 'faults' of Hindu philosophy.
[3] See Colebrooke's *Essays* (ed. 2), vol. i. pp. 453–455.
[4] *Dharma and Vinaya.*

CHAPTER III.

ANCESTOR-WORSHIP.

I HAVE said that the rules of life contained in the most ancient of the sacred law-books of the Hindus are strongly affected by two systems of religious belief which were probably at one time independent of one another. Although welded together by the Hindu sacerdotal lawyers, the purgation of sin by posthumous punishment in a series of hells, and the purgation of sin by transmigration from body to body, are distinct solutions of the same problem. The breach of the rules set forth in the law-books afflicts the lawbreaker with a special taint, which, unless he be cleansed from it by proper penances in his lifetime, will cling to his spirit after death, and can only then be purged away by far severer expiations. Two separate views of the life after death would appear to have contributed the theory of successive special Purgatories, and the theory of Transmigration, to the maturer Hindu system which has joined them together. But besides the traces of this two-fold religious speculation, there is plain evidence of yet a third, and perhaps a still older religion, standing quite by itself, in these treatises. This is the Worship of Ancestors, which has shaped the entire Hindu law of Inheritance. The connection between Ancestor-Worship and Inheritance is not, however, peculiar to the Hindus. The most ancient law of a considerable number of the communities which have contributed most to civilisation shows us the performance of some part of this worship as a duty incumbent on expectant heirs and as the condition of their succession. This rude and primitive belief has thus very strongly influenced the branch of jurisprudence which, as linking the generations each to each, is of the greatest importance to all advancing societies.

Ancestor-worship is not here to be understood in the sense in which the expression has usually been taken by scholars. It is not the cult of some long-descended and generally fabulous ancestor, of some Hero, the name-giving progenitor of a Race, a Nation, a Tribe, a House or a Family; an Ion, a Romulus, or an Eumolpus. Nor, again, can it be visibly connected with the superstitious reverence of savages for their Totem, even though it symbolise to them the living creature from which they conceive themselves to have sprung. In the case before us the ancestors sought to be propitiated by sacrifices and prayers are ancestors actually remembered, or, at all events, capable of being remembered by the worshipper. Proximity in time is essential to the worship of which I am speaking. There are signs that, according to the early ideas of many communities—communities, for example, so far removed from one another as the Hindus and the Irish—a man living as a member of a Joint Household or Family could at most expect to see at some time during life three generations above him and three generations below him. In accordance with this expectation, the ancestors worshipped are three: the father first, then the grandfather, and then the great-grandfather. The reverence paid to remoter ancestors, not personally remembered, may be believed to be a later off-growth of these ideas. Their original character, and the nature of the feelings associated with them, may be gathered from the account of its own ancestor-worship which Canon Callaway (*apud* Tylor, 'Primitive Culture,' ii. 106) attributes to a group of South African tribes. 'Although they worship the many Amatongo (ancestral spirits) of their tribe, making a great fence around them for protection, yet their father is before all others when they worship the Amatongo. Their father is a great treasure to them even when he is dead; and those who have grown up, knew him thoroughly, his gentleness and his bravery. . . . . Black people do not worship all Amatongo indifferently—that is, all the dead of their tribe. Speaking generally, the head of each house is worshipped by the children of that house, for they do not know the ancients who are dead. But their father, whom they knew, is the head by whom they begin and end in their prayer, for they knew him best. . . . . We do not know, they say, why he should regard others besides us : he will regard us only.'

'Manes-worship,' says Mr. Tylor ('Primitive Culture,' ii. 108), 'is one of the great branches of the religion of mankind. Its principles are not difficult to understand, for they plainly keep up the social relations of the living world. The dead ancestor, now passed into a deity, goes on protecting his family and receiving from them suit and service as of old. The dead chief still watches over his own tribe, still holds his authority, by helping friends and harming enemies, still rewards the right and sharply punishes the wrong.'

Ancestor-worship, the worship of father, grandfather, and great-grandfather, has among the Hindus a most elaborate liturgy and ritual, of which the outlines are given in the law-books, and with special fulness in the Book of Vishnu. In the eye of the ancient Hindu sacerdotal lawyer, the whole law of Inheritance is dependent on its accurate observance. What is more remarkable is that the same close interdependence of ritual and inheritance exists in the eye of the modern Anglo-Indian Judge, who, after long ages, strives to interpret the old books and to apply their doctrine to the case before him. There are few more curious meetings of the Past and Present than when an English Judge, in the High Court (let us say) of Calcutta, carefully weighs the exact amount of Spiritual Benefit derived by a deceased Hindu from the sacrifices of a descendant or collateral, and the exact degree of blessing reflected on the kinsman who has offered the sacred water and the sacred cake. All the main juridical conceptions of the Roman law of Succession are to be found in the Hindu law, but the terms expressing them (*suus hæres*, agnate, cognate, *actio de familiâ erciscundâ*, and so forth) mostly translate into phrases taking their meaning from the liturgy and sacrificial order of Hindu Ancestor-worship.

It must be added, for the full understanding of the subject, that the Hindu worship of ancestors does not merely affect the Hindu law of Inheritance. It influences the everyday life of that vast majority of the people of India who call themselves in some sense Hindus, and indeed in the eyes of most of them their household divinities are of more importance than the whole Hindu pantheon. 'It is a common saying among us,' says the author of an instructive treatise on the 'Law of Inheritance' (Professor Rajkumar Sarvadhikari) 'that a man may be pardoned for neglecting all his social duties, but he is for ever cursed if he fails to perform the funeral obsequies of his parents, and to present them with the offerings due to them.' Ancestors, as divine beings to be worshipped, are referred to in the Vedas, and stand rather obscurely, under the name of Pitris, in the background among the Hindu gods ; but every day[1] in the dwelling of a Hindu the *shradda* is offered to father, grandfather, and great-grandfather ; and the offering is made with special observances on particular days and on particular occasions. The most solemn oblation of all is made at a funeral, and the rules for it are already set forth in minute detail by the oldest of our authorities (Gautama, xv. i. 30). The first-fruits of the earth, the first portions at all meals, all *ἀπαρχαὶ* and *primitiæ*, are the special share of these ancestral gods ; the special blessing which they confer is length of days and the unbroken continuity of the family. M. Fustel de Coulanges was the first modern writer to bring into full light, in his brilliant book 'La Cité Antique,' the hitherto little observed importance of the private or family worship of the Greeks and Romans. Almost all attention had been concentrated on the greater Gods of these societies. In their honour, temples were raised, oxen were led to the altar, processions moved along the streets, religious confraternities were formed. These were Gods of Nations or Tribes, Gods born of primitive observation of Nature and primitive reverence for her, Gods sprung from wide-spreading emotional movements, like Dionysus and Cybele. But they lived far away in their own Olympus, and the real effective worship of the Roman was to the Lares and Penates. Their clay or metal images stood in the lararium or penetralia, in the innermost recesses of the house, and represented forefathers who in the earliest days had actually been buried in it before the hearth. At their head was the eldest of them, the Lar Familiaris. This private worship, like the public worship of the greater Gods, had its ritual, its liturgy, and its priesthood within the circle of the family ; and the intimacy with which it mixed itself with all family relations is the staple of the striking argument which fills 'La Cité Antique.'

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[1] Sarvadhikari, *Hindu Law of Inheritance*, pp. 83 *et seq.*

Ancestor-worship is still the practical religion of much the largest part of the human race. We who belong to Western civilisation are but dimly conscious of this, mainly on account of the Hebrew element in the faith of Western societies. Sacrifice to ancestors was certainly not unknown to the Hebrews either as a foreign practice or as a prohibited idolatry. 'They joined themselves unto Baal-Peor,' it is written in Psalm cvi. 28, '*and ate the sacrifices of the dead.*' And again in Deuteronomy xxvi. 14 : 'Thou shalt say before the Lord thy God . . . I have brought away the hallowed things out of my house . . . I have not transgressed thy commandments, neither have I forgotten them . . . I have not eaten thereof in my mourning; nor have I taken away ought thereof for any unclean use; *nor given ought thereof to the dead.*' But it has been generally allowed that the Hebrew Scriptures contain few allusions to this wide-spread practice;[2] and any contact with it which may be found in Christianity or Mahommedanism is due to accidental causes. A wild Turkoman, though he passes as a fanatical Mahommedan, may occasionally worship at his ancestor's grave, as did his forefathers in the extreme East, and here and there a locally reverenced Christian saint may have succeeded to the supposed miraculous power of a local heathen divinity who, in his origin, may have been a deified ancestor. But all sects of Hindus, and all the multitudes affected by Hinduism, worship their ancestors. The ancient religion lately revived by State authority in Japan at the expense of Buddhism, and known as Shintoism, appears to be a form of ancestor-worship ; the Chinese universally worship their ancestors ; and these, with ancestor-worshipping savages, make up the majority of the human race.

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[2] The Fifth Commandment, which promises length of days as the blessing earned by honouring father and mother during their lifetime, may be compared with the very ancient Chinese liturgical odes in which the long duration of the family is described as the special reward for honouring dead parents with sacrifice. See the fine Chinese hymn, taken from the ritual of Ancestor-worship, and translated by Dr. Legge (Shih-King, *Sacred Books of the East*, vol. iii. pp. 348, 349). 'With happy auspices and purifications thou bringest the offerings and dost present them, in spring, summer, autumn, and winter, to the dukes and former kings. And they say, "We give to thee, we give to thee myriads of years, duration unlimited. The spirits come and confer on thee many blessings. . . . Like the moon advancing to the full. Like the sun ascending the heavens. Like the everlasting southern hills. Never waning, never falling. Like the luxuriance of the fir and the cypress. May such be thy succeeding line!"'

The Chinese are the great example of a community earnestly devoted to this system of religious belief and observance. The evidence of its antiquity and of its prevalence among them is extremely abundant. Let me quote what is probably the oldest and the newest testimony on the subject. The most ancient Chinese records are the earlier portions of those famous collections in prose and verse, the Shu-King and the Shih-King. A fairly trustworthy chronology carries back the earliest prose documents in the Shu-King to the twenty-fourth century before the Christian era, and the oldest liturgical odes of the Shih-King are thought to be contemporaneous with the eighteenth century B.C. The second of the pieces in the Shu-King speaks of Yao retiring from government 'in the temple of his accomplished ancestor,' and the first and most ancient hymn in the Shih-King, which celebrates a sacrifice to ancestors, represents the practice as even then old. 'Here are set our hand-drums and drums. The drums resound harmonious and loud, to delight our meritorious ancestor. The descendant of Thang invites him with the music that he may soothe us with the realisation of our thoughts . . . From of old, before our time, the former men set us the example how to be mild and reverent from morning to night, and to be reverent in discharging the service.'

For the most recent evidence I refer to a paper published in 1882, and manifestly based on missionary information.[3]

'Great (in China) are the expenses entailed by the dead on the living. In no land can the loss of a kinsman be more severely felt. The body must be dressed in fine new clothes, and another good suit must be burnt. A handsome coffin is essential, and the priests must be largely paid for funeral services at the house of the deceased, and again for their services in ascertaining the lucky day for burial. . . . From the tenth to the seventeenth day after death, the priests, whether Taoist or Buddhist, hold service in the house to protect the living from the inroads of hosts of spirits who are supposed to crowd in, in the wake of their new friend. . . . Many families are permanently impoverished by the drain to which they are subjected, and which is likely to recur again and again. To omit them would be to incur the anger of the spiteful dead, who are now in a position to avenge themselves on the living by inflicting all manner of sickness and suffering. . . . The priests pretend to have had revelations from the spirit-world, showing the unfortunate dead to be tortured in Purgatory, and that he can only be extricated by a fresh course of costly services in the house. The price to be paid is fixed at the highest sum they think it possible to extract. It ends in the family raising every possible coin, and even selling their jewels, to procure the necessary sum.'

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[3] 'Ningpo and the Buddhist Temples,' by Constance Gordon Cumming (*Century*, September 1882).

Finally, I will repeat Mr. Tylor's reflections on the whole of this marvellous system of belief and practice ('Primitive Culture,' ii. 108): 'Interesting problems are opened out to the Western mind by the spectacle of a great people who for thousands of years have been seeking the living among the dead. Nowhere is the connection between parental authority and conservatism more graphically shown. The worship of ancestors, begun during their life, is not interrupted but intensified when death makes them deities. The Chinese, prostrate bodily and mentally before the memorial tablets which contain the souls of his ancestors, little thinks that he is all the while proving to mankind how vast a power unlimited filial obedience, prohibiting change from ancestral institutions, may exert in stopping the advance of civilisation. The thought of the souls of the dead as sharing the glory and happiness of their descendants is one which widely pervades the world; but most such ideas would seem vague and weak to the Chinese, who will try hard for honours in his competitive examination with the special motive of glorifying his dead ancestors, and whose titles of rank will raise his deceased father and grandfather a grade above him, as though with us Zachary Macaulay or Copley the painter should have viscounts' coronets officially placed on their tombstones. As so often happens, what is jest to one people is sober sense to another. There are 300 millions of Chinese who would hardly see a joke in Charles Lamb, reviling the stupid age that would not read him, and declaring that he would write for antiquity.'

The relations of Ancestor-worship to other religions held in honour by those who practise it appear to have varied much from community to community, and from time to time within the same community. In China it seems to have more than held its ground against the other more famous faiths. Confucianism is deeply implicated with it, and the creeds of Buddha and of Lao-Tze have assimilated it, and their priests indifferently perform its ceremonies. Sir Alfred Lyall has amusingly described the liberties which the Chinese Government takes with war-gods and river-gods, promoting and deposing them by acts of State; but it may be doubted whether it would venture on any serious interference with the service of the dead. Among the Hindus, the ancestral deities are but dimly seen amid the Vedic gods, but the later sacerdotal law-writers seem conscious of a rivalry between them and these greater divinities. The ritual of ancestor-worship given in the book of Vishnu begins with sacrifice to the gods (LXXIV. 1), and Manu expressly says (III. 205), 'Let an offering to the gods be made at the beginning and end of the *shraddha*; it must not begin and end with an offering to ancestors, for he who begins and ends it with an oblation to the Pitris quickly perishes with his progeny.' Nevertheless, although the greater Hindu gods, like the greater divinities of the Greeks and Romans, have their temples, rites, and sacrifices, though they have their special devotees, though they are honoured by pilgrimages and festivals, in which multitudes take part, the worship offered every day by Hindus in their private dwellings to their immediate ancestors is perhaps more genuine, and is certainly far more continuous. I have already quoted the statement of a learned contemporary native lawyer, that every other crime may be forgiven to his co-religionists, but not the neglect of ancestral sacrifices. On the other hand, the comparatively scanty Roman evidence concerning the *sacra privata* would seem to show that they dwindled in importance and popular respect. In Cicero's time the charges for them were still a heavy burden on Inheritances, but they seem to have followed a course of change not unusual elsewhere, and the payments for them were in the nature of fees or dues to the College of Pontiffs. There are signs, too, that the household gods were losing their divinity. The Lares became hardly distinguishable from the Larvæ—a word of the same origin, which is said to have at first meant spirits not laid to rest with the proper rites [4]—and indeed from the Lemures, mere goblins who haunted tombs. The 'Lars and Lemurs,' who moaned 'with midnight plaint' at the Nativity, are thus not improperly coupled together in Milton's verse. But though this most ancient religion died, its effects on civil law remained, and indeed still survive. One curious relic of it may be found in the Codes of the Christian Emperors. There is a classification of 'Things' which divides them into their kinds, and then subdivides 'things which are not the property of anybody' into Res Sacræ, Res Sanctæ, and Res Religiosæ. Res Sacræ are things consecrated to the greater gods; Res Religiosæ are expressly defined as things dedicated to the spirits of the dead, the Manes; and some part of the Roman rules relating to this last class of things still affects our law of churchyards. But, further than this, there can be no doubt that our law of Inheritance is still partially shaped by the old worship of the Manes, though the exact degree in which it has been influenced is not now ascertainable. Almost all the English law on the subject of the descent of Personalty, a great deal of Continental law on the same subject, and some part of our law of Realty, has for its foundation the 118th Novel, or Novella Constitutio, of Justinian. This Novel is the last revision of the older Roman law of Succession after death, which was formed by the fusion of the rules of inheritance contained in the venerable Twelve Tables with the Equity of the Prætor's Edict; two streams of law profoundly influenced at their source, as no reader of M. Fustel de Coulanges can doubt, by the worship of ancestors.

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[4] The ancestor-worshipping peoples appear to have agreed in thinking that the gravest consequences depended on properly disposing of the bodies of the dead. But there was no such agreement as to what was the proper mode of disposal. There is a startling contrast between the last prayer of Ajax to Zeus that he be at least buried, so that dogs and birds eat not his body, and the prayer of the devout Zoroastrian that he be *not* buried, and that dogs and birds *do* eat his remains. Compare Sophocles, *Ajax*, 826, *et seq.* with the Zend Avesta, iii. 4, 30 (*Sacred Books of the East*, vol. iv.): '"O Maker of the material universe, Thou Holy One, if a man shall bury a corpse in the earth and if he shall not disinter it within the second year, what is the penalty for it? What is the atonement for it?" Ahura Mazda answered, "For that deed there is nothing can pay, nothing can atone; nothing can cleanse from it; it is a trespass for which there is no atonement for ever and ever."' And again, at vi. 4, 44: '"O Maker of the material world, Thou Holy One, whither shall we bring, where shall we lay, the bodies of the dead?" Ahura Mazda answered, "On the highest summits, where they know there are always corpse-eating dogs and corpse-eating birds, O holy Zarathrusta."' We can sympathise with the Greek feeling, though not in its full strength; but it would be hardly credible that a vigorous and comparatively civilised nation once followed the Zoroastrian usage, were it not for the stubborn survival of it among the Parsees, whose 'Towers of Silence' are among the first objects which strike the eye of the traveller on landing in Western India.

Modern investigators who have made it their special business to search for the earliest forms of mental conceptions among the present ideas of savages have based a theory of the origin of ancestor-worship upon the phenomena of sleep and unconsciousness as they present themselves to men not yet escaped, or barely escaped, from savagery. ‘The idol,’ writes Sir John Lubbock, ‘usually assumes the human form, and idolatry is closely connected with that form of religion which consists in the worship of ancestors. We have already seen how imperfectly civilised man realises the conception of death, and we cannot wonder that death and sleep should long have been connected together in the human mind. The savage, however, knows well that in sleep the spirit lives, even though the body appear to be dead. Morning after morning he wakes himself and sees others rise from sleep. Naturally, therefore, he endeavours to rouse the dead. Nor can we wonder at the very general custom of providing food and other necessaries for the use of the dead. Among races leading a settled and quiet life this habit would tend to continue longer and longer. Prayers to the dead would reasonably follow from such customs, for even without attributing a greater power to the dead than to the living, they might yet, from their different sphere and nature, exercise a considerable power, whether for good or evil. But it is impossible to distinguish a request to an invisible being from prayer, or a powerful spirit from a demi-god' ('Origin of Civilisation and Primitive Condition of Man,' 4th ed. 1882). In harmony with this theory, the various societies of mankind, in their relation to belief in a spirit world, have been thus classed by Mr. Herbert Spencer ('Principles of Sociology,' p. 322): 'Taking the aggregate of the human peoples, tribes, societies, nations, we find that nearly all of them have a belief, vague or wavering, or settled and distinct, in a reviving other-self of the dead man. Within this class of peoples, almost co-extensive with the whole, we find a class, not quite so large, by the members of which the other self of the dead man, definitely believed in, is supposed to exist for a considerable period after death. Nearly as numerous is the class of peoples included in this who show us ghost propitiation, not only at the funeral but for a subsequent interval. Then comes the narrower class included in the last, the more settled and advanced peoples who, along with the developed belief in a ghost that permanently exists, show us a persistent ancestor-worship. Again, somewhat further restricted, though by no means small, we have a class of peoples whose worship of distinguished ancestors begins to subordinate that of undistinguished. And eventually the subordination, growing decided, becomes most marked when the ancestors were leaders of conquering races.'

The theory fully developed, appears to be that the dead are believed by savage men to live the life which they themselves live in dreams, a life very like that of their waking hours and yet unlike it. It is thought that in death, as in the visions of the night, the spirit meets its everyday companions and kinsmen, but that it meets, besides, others who have disappeared from the living world, and especially those whom it loved, feared, or hated. They eat, drink, and speak as of old; the only difference between their world and that of life is perhaps that they melt into other forms with an ease and rapidity which are new, but which have ceased to surprise. In this region, the visitant most frequently meets the dead whose life had most contact with his own, and specially the Father armed with his Paternal Power. This is the figure which, when sleep leaves him, he best remembers. In such a state of belief and feeling, the first impulse of the kinsmen whose chief is seen to have finally departed for the spirit-world, is to provide him with food and drink, perhaps with arms, ornaments, and attendants, for his new home, which is to be so like his old one. In these impulses the bloody funeral rites, which are still described in the Homeric poems, are supposed to have had their origin, and another survival is the sacrifice of the Hindu to his ancestors with the 'water and the cake.' I myself certainly think that the theory has been made to account for more than it will really explain by some of the eminent writers who have adopted it; but there is some interesting evidence that, so far as the early Hindus are concerned, it goes far to show the origin of their ancestor-worship. There is manifest perplexity in the minds of the sacerdotal law-writers at the contradictions between the various religious doctrines underlying the law. How is the doctrine of benefit to ancestors by ritual and sacrifice to be reconciled with the theory of transmigration and of the purgation of sin by punishment after death? Nothing seems clearer to them than the principle that, as a man has made himself by his acts, so he leaves this life for the next, pure or impure, sinful or sinless. He dies when that result is entailed by the result of his acts in some past state; he goes into the next state according to the result of his acts here. These principles are laid down in solemn and sometimes eloquent language. 'Single is each man born; single he dies; single he receives the reward of his good, and single the punishment of his evil deeds. When he leaves his corpse like a log or a heap of clay upon the ground, his kindred retire with averted faces; but his virtue accompanies his soul. Continually, therefore, by degrees let him collect virtue, for the sake of securing an inseparable companion; since, with virtue for his guide, he will traverse a gloom, how hard to be traversed!' (Manu, IV. 240). 'What thou hast to do to-morrow, do it to-day.

What thou hast to do in the afternoon, do it in the forenoon, for death may come at any moment.' 'When a man's mind is fixed upon his field, or his traffic, or his house, or while his thoughts are engrossed by some beloved object, death suddenly carries him away as his prey, as a she-wolf catches a lamb. Time is no one's friend, and no one's enemy. When the effect of his acts in a former existence, by which his present existence is caused, has expired, Time snatches him away forcibly. He will not die before his time has come, even though he has been pierced by a thousand shafts ; he will not live after his time is out, though he has only been touched by a blade of kusa grass' (Vishnu, xx. 44). If this be so, it is a rigorous logical conclusion that nothing which the living can do will help the dead. But the writer I am quoting finds a solution in what seems to us the most unnatural of principles—that relatives of the dead ought not to mourn for him, but nevertheless should offer the sacrifices. 'As both a man's good and bad actions will follow him after death like associates, what does it matter to him whether his relatives mourn over him or not ? But, as long as his relatives remain impure, the departed spirit finds no rest, and returns to visit his relatives, whose duty it is to offer up to him the funeral ball of rice and the water libation. Till the Sapindikarana has been performed, the dead man remains a disembodied spirit, and suffers both hunger and thirst. Give rice and a jar with water to the man who has passed into the abode of disembodied spirits. . . . Perform therefore the Shradda always, abandoning bootless grief' (Vishnu, xx. 31–36). It is impossible to state the ancient superstitious belief more nakedly; if the ghost be not supplied by his mourning kinsmen with food he will 'walk;' but the law-writer before us evidently finds the doctrine unaccountable, and maintains it because there is authority for it. It is at the same time to be observed that the problem is solved in a different way by the latest Hindu law, which declares that the effect of sacrificing to a dead ancestor is to deliver him from one special purgatory, the 'Hell called Put.' The doctrine of direct posthumous punishment has to this extent absorbed the opinion that the perturbed spirit revisits his ancient haunts.

There is one peculiarity of ancestor-worship which recent speculations on primitive human institutions invest with a great deal of interest. The ancestors worshipped appear to have been at first always male ancestors. 'Although,' says Sir John Lubbock, 'descent amongst the lowest savages is traced in the female line, I do not know of any instance in which female ancestors were worshipped.' Female ancestors in the direct line are now worshipped by the civilised Chinese, but the evidence shows that the posthumous honours paid to women are of later origin than the worship of men. In the oldest of the Chinese sacrificial odes, plausibly dated at not much less than two thousand years before Christ, the 'accomplished' and 'meritorious' ancestor celebrated is manifestly a man. The worship of female ancestors does not appear till a much later division of the hymns. 'We have our high granaries,' runs the ode called the 'Fang Nien'—'We have our high granaries, with myriads and hundreds of thousands and millions of measures in them, for spirits and sweet spirits, to present to our forefathers, male and female;' and again, the sacrificer in another hymn is made to say, 'O great and august father, comfort me, your filial son. . . . I offer this sacrifice to my meritorious father, and to my accomplished mother.' It is thought that the still existing practice of placing spirit tablets of wives along with those of husbands in their shrines had by this time begun. So too in the most ancient Hindu law-books, the funeral oblation is confined to male ancestors. At this rite, says Apastamba (II. vii. 16. 3), the manes of one's father, grandfather, and great-grandfather are the deities to whom the sacrifice is offered. The rite is to be performed in the latter half of the month of which the luckiest day is the fifth. 'If he performs it on the fifth day, sons will be born to him; he will have numerous and distinguished offspring, and he will not die childless' But if he performs it on the first day of the half-month, the caution is given that the issue of the sacrificer will consist chiefly of daughters. When, however, we come to writers of a much later era, like Vishnu, we find a distribution of the sacrifices which is very significant. Vishnu gives us a summary of the whole ritual of ancestor-worship as practised at the date of the treatise called by this name (Vishnu, chap. lxxiii.) First of all the sacrificer is to worship the (greater) Gods. Then on particular days—the ninth days of the dark halves of certain months—he is to consecrate an offering with proper hymns and scriptural texts and present it to three Brahmans present, who represent his father, grandfather, and great-grandfather. The liturgy and ritual which he is to follow are indicated, head by head, and it is essential for the virtue of the sacrifice that a company of Brahmans should have been invited. On certain other sacred days, the Anvashtakas, he is to sacrifice to his mother, his paternal grandmother, and his paternal great-grandmother; and lastly, says the writer, 'an intelligent man'—an expression which, as it appears to me, is always used of a doubtful point—'must offer shraddas to his maternal grandfather, and to the father and grandfather of him in the same way.' The order of celebration seems to me to follow the historical order, and to show that the ancestors first worshipped by the Hindus were the father, grandfather, and great-grandfather.

It is clear then, I think, that wherever ancestor-worship arose, Paternity was fully recognised ; and as the texts relating to this worship are as old as any others in the sacerdotal law-books, and indeed are probably the oldest, I attach small importance to casual expressions found here and there in these treatises which have been thought to show that their writers preserved traditions of the savage custom of tracing descent through females only. Still, as we cannot doubt the existence and prevalence among some part of mankind of this savage usage, sometimes called 'Mother-law,' it is impossible not to ask oneself the question, Did the worship of the dead bring about the recognition of paternity, or is ancestor-worship a religious interpretation of, or a religious system founded upon, an already existing institution ? M. Fustel de Coulanges, without referring to the custom of 'Mother-law,' certainly seems to me to express himself occasionally as if he thought that all the characteristics of the so-called Patriarchal Family were created by the worship of ancestors which was ever celebrated in the recesses of the household ; and that from this worship sprang the Father's Power as its high-priest, and also the denial of kinship to persons no longer *able to participate in it*, as the married daughter and the emancipated son. It may well be believed that ancestor-worship, by consecrating, strengthened all family relations, but in the present state of these inquiries the evidence certainly seems to be in favour of the view that the Father's Power is older than the practice of worshipping him. Why should the dead Father be worshipped more than any other member of the household unless he was the most prominent—it may be said, the most awful—figure in it during his life? It was he, according to the theory which I have described, who would most frequently show himself, affectionate or menacing, to his sleeping children. This opinion is fortified by the recent investigations into the customary law of the Punjab, the earliest Indian home, I must repeat, of the Aryan Hindus after their descent from the mountain-land of their origin. Ancestor-worship does exist among the Hindus of the Punjab. But it is a comparatively obscure superstition. It has not received anything like the elaboration given to it by the priesthood in the provinces to the south-east, many of whose fundamental doctrines are unknown to the Punjabee communities of Hindus. Nevertheless, the constitution of the Family is entirely, to use the Roman phrase, 'agnatic;' kinship is counted through male descents only. There is a very strong resemblance between these usages and the most ancient Roman law, and their differences, where they differ, throw very valuable light on the more famous of the two systems.

The truth seems to be that, although Ancestor-worship had at first a tendency to consolidate the ancient constitution of the Family, its later tendency was to dissolve it. Looking at the Hindu system as a whole, we can see that, as its historical growth proceeded, the sacerdotal lawyers fell under a strong temptation to multiply the persons who were privileged to offer the sacrifices, partly in the interest of the dead ancestor, chiefly in the interest of the living Brahman. In this way, persons excluded from the ancient family circle, such as the descendants of female kinsmen, were gradually admitted to participate in the oblations and share in the inheritance. Some traces of a movement in this direction are to be found throughout the law-books; and a very learned Indian lawyer (Mr. J. D. Mayne, 'Hindu Law and Usage,' chap. xvi.) has shown that, wherever in modern India the doctrine of Spiritual Benefit—that is, of an intimate connection between the religious blessing and the civil right of succession—is most strongly held, women and the descendants of women are oftenest permitted to inherit. It is remarkable that the Equity of the Roman Prætor, which was probably a religious before it was a philosophical system, had precisely the same effect in breaking up the structure of the ancient Roman family, governed by the Father as its chief

CHAPTER IV.

ANCESTOR-WORSHIP AND INHERITANCE.

The close connection between succession to property after death and the performance of some sort of sacrificial rites in honour of the deceased has long been known to students of classical antiquity. A considerable proportion of the not very plentiful remains of Greek legal argument to be found in the Athenian Orators is occupied with questions of inheritance, and the advocate or litigant frequently speaks of the sacrifices and the succession as inseparable. 'Decide between us,' he says, 'which of us should have the succession and make the sacrifices at the tomb' (Isæus, 'In the goods of Philoctemon,' Or. vi.) 'I beseech you by the gods and immortal spirits not to allow the dead to be outraged by these men; do not suffer his worst enemies to sacrifice at his grave' (Or. ii.). In a former work I pointed out the number, costliness, and importance of these ceremonies and oblations among the Romans, and I insisted on their probable significance as the source of the peculiar fictions which cluster round early family law ('Ancient Law,' p. 191). The best explanation, I argued, of the facility with which a stranger can be made a son is that, being admitted to the religious observances, he is not distinguishable from a son under his religious aspect. The later experience of the world may show us that in the mere blending of the ideas of inheritance and offering there is nothing to surprise us. It is natural enough. Wherever it has been matter of belief that the surviving members of a dead man's family could do anything to better his lot in the world after death, it has been thought their duty to do it before they entered upon his possessions. The mediæval Christian Church held this view of personal or movable property; it was primarily a fund for the celebration of masses to deliver the soul of the owner from purgatory. Upon this doctrine was founded the jurisdiction of our Ecclesiastical Courts, in which all property of this kind vested in the first instance before it could be distributed; and this jurisdiction, coupled with the necessary powers over Executors in the case of Wills, and of Administrators in the case of Intestacies, has descended to the modern Court of Probate. The new light which we owe to the author of 'La Cité Antique' is his determination of the nature of the divine beings to whom the oblations, which exercised so powerful an influence on Athenian and Roman heritages, were devoted. They were of course not offered to any one Supreme God. But neither were they offered to the greater deities of the local Pantheon. 'Le culte des dieux de l'Olympe et celui des Héros et des Mânes n'eurent jamais entre eux rien de commun,' says M. Fustel de Coulanges. The worship was given to the dead, chiefly to the remembered dead who had just passed away into a life not further removed from their late existence than a sleep from reality.

I will note in passing that the excessive expensiveness of the Roman *sacra privata*, which is the burden of Cicero's complaints in his private letters, seems to be a feature of still surviving ancestor-worship. The writer of a paper I have before quoted ('Ningpo and Buddhist Temples') gives a curious calculation, upon what is probably American missionary authority, of the expenses to which the Chinese are put by worshipping their forefathers. 'One well entitled to know what he spoke of said that fully thirty millions of dollars are annually expended in China at the three great festivals in honour of the dead, and, with the average expenditure of each family, fully 150 millions of dollars are spent in quieting the spirits.' There is no doubt also that funeral rites and oblations are extremely expensive in India, and I have heard their heavy cost seriously urged as a reason against imposing a duty on legacies and successions. The expensiveness of religious observance among Hindus arises from the necessity which it involves of feasting Brahmans, sometimes in multitudes, and making them gifts. The oldest of the law-books strongly inculcate the duty of employing the ministry of Brahmans. Three are especially to be in places of honour at all funeral celebrations, who are to represent the three ancestors worshipped—the father, grandfather, and great-grandfather. But many more are to be entertained. 'Pure, with composed mind, and full of ardour,' says Apastamba, 'he shall feed Brahmans who know the Vedas.' 'He shall feed an uneven number of Brahmans, at least nine,' is the rule of Gautama, 'or let him feed as many as he is able to entertain.' Some singular but very intelligible texts forbid the worshipper to make these sacred feasts a pretext for entertaining his own relatives. 'The food eaten at a sacrifice by persons related to the giver is a gift offered to goblins. It reaches neither the Manes nor the Gods Losing its power to procure heaven, it wanders about in this world, as a cow that has lost her calf runs into a strange stable' (Apastamba, II. vii. 17. 8).

We have now to consider some of the ways in which the law and custom of ancestor-worshipping societies have been affected by their peculiar faith and religious practice. The first instance of a transformation in law which I will give is one nearly connected with the growing costliness of the ritual. By this ritual a religious and intellectual aristocracy lived. One of the commonest popular errors about the Brahmans even now current in England is that, because they are spiritually the highest, they are therefore the wealthiest and most powerful of the Hindu castes. They count among them some opulent and powerful families, and one Royal house in India is Brahman, but, on the whole, they are not specially wealthy. It would be more accurate to describe them as a serving and ministering class, their occupations varying from the high administrative duties which they once monopolised in the Mahratta States to such humble functions as those of the cook, whose service is a luxury, because no impurity can be contracted at his hands. The Brahman of the old law-books is still a priest and spiritual director more than anything else, though with a visible tendency to become a lawyer, a judge, or an administrative counsellor. He lives, however, by the bounty of others, by their charitable and pious gifts, more particularly those given to him on the great occasions of sacrifice. It is strongly said by a modern writer (J. D. Mayne, 'Hindu Law and Usage,' p. 205) that the modern law, as promulgated by Manu, might be described as a law of gifts to Brahmans. 'Every step of a man's life from his birth to his death required gifts to Brahmans. Every sin which he committed might be expiated by gifts to Brahmans. The huge endowments for religious purposes which are found in every part of India show that these precepts were not a dead letter.' Now one chief impediment to pious liberality is that system of joint ownership by groups larger than families which is still common in India, especially in that earliest home of the Aryan race, the Punjab. Every man's rights in such a group are more or less limited by the rights of everybody else; and, as a rule, the assent of the entire group is necessary before any part of its property can be alienated. Hence the sacerdotal system, of which the rudiments are to be seen in the law-books, is most manifestly adverse to joint forms of property. The writers frankly avow their motives for this dislike of co-ownership and for their partisanship of partition. 'In partition,' says Gautama, 'there is increase of spiritual merit' (x. viii. 4). The principle is still more plainly put by Manu (IX. iii.): 'Either let them live together, or, if they desire separately to perform religious rites, let them live apart; since religious duties are multiplied in separate houses, their separation is therefore right and even laudable.' The more separate households, the more occasion for domestic sacrifice, the more opportunities for pious largesse to the sacred order.

The modern writer I have quoted (J. D. Mayne, p. 204) cites my own opinion, expressed in a former work ('Early History of Institutions,' p. 104) that the Christian Church, when engaged in proselytism among barbarous societies, exerted a similarly dissolving force upon tribal ownership. The Church certainly introduced its barbarous converts to the Testament or Will; it strove to strengthen their reverence for Contracts; and the Irish evidence seems to prove that it largely extended Separate, as distinguished from Tribal, ownership. In reading the Brehon tracts, you remain in doubt whether the writer means to lay down that tribal land under certain circumstances may be parted with generally and in favour of anybody, or whether it is only to be alienated in favour of the Church. The strong probability is that he intended to sanction gifts to the Church primarily; and that a generally enlarged power of separate alienation was the consequence of such rulings. But it has always to be remembered that there is a radical difference between the Brahman encouragement of charitable profusion and the enlargement of legal facilities for pious endowment by the mediæval Christian Church. Charity with the Brahman began strictly at home; he was wedded to it, because he lived by it. But the Church, although it certainly desired to fortify by endowments every asylum and stronghold which it planted amid barbarism, had other classes under its protection besides its own servants and clergy. It fed the poor and needy at its gates. It was ever careful for the orphan and the widow. But the Brahman law-books, with much elevation and some tenderness of feeling, are constantly offensive in the contempt, sometimes amounting to loathing, which they express for all classes except the sacred caste and other castes powerful enough to pretend to equality with it, or proximity to it.[1]

We come now to some results of Ancestor-worship which are of the highest interest as throwing light on a number of perplexing questions which embarrass our first steps in the examination of very ancient societies. It seems clear that, according to the most ancient ideas, not only must the ancestor worshipped be a male ancestor, but the worshipper must be the male child or other male descendant. Under the conditions of thought we have been supposing, it will have been seen that the verge of life and death was very easily overstepped. The dead man was he who had been the living dreamer, only that he had now passed permanently into the life of dreams. It thus seemed proper that the sacrifice should be offered by a person who one day would take his place in the chain of deified ancestors, and this could only be a male descendant. Hence there arose, among the ancestor-worshipping peoples, a most intense desire for male offspring and, as a consequence of this desire, a remarkable set of ideas about paternity, sonship, and inheritance, which must have been widely diffused of old among all the more powerful races of mankind, and specially those of the Aryan stock. There are manifest traces either of these ideas, or of the customs with which they were intermixed, in the legal antiquities of the Athenians and of the Spartans, of the Romans, of the Celtic Irish, of the Hebrews, and of the Chinese. As is natural, from the deeply sacerdotalised character of their legal literature, the fullest and most detailed account of a family system shaped and interpenetrated by ancestor-worship is to be found in the ancient books of the Hindus. It cannot, of course, be taken for granted that this system, in its integrity, ance existed everywhere. One feature of it is found here, another there. But there does seem to have been a general likeness between the deductions which the priests and lawyers of a large number of ancient societies drew from the principle that sacrifice and worship were due, under severe supernatural penalties, from male children to their dead forefathers.

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[1] See Note A to this chapter.

We cannot, as it appears to me, frame in our minds any reasonable explanation of Ancestor-worship and its legal consequences, unless we assume that, when it first arose among men, the Father of each family appeared to them in the form in which he constantly shows himself on the threshold of jurisprudence, and which he probably wore[2] when the human race began. He is the Pater Familias. The physical paternity is fully recognised, but it is blended with protective power. Most of the males subject to him are really his children, but, even if they have not sprung from him, they are subject to him, they form part of his household, they (if a word coloured by later notions be used) belong to him. On the other hand, under the religious aspect of these relations, from the point of view of a sacerdotal lawyer, the son is simply the person who can efficaciously offer the sacrifices. Dr. Bühler (Preface to vol. ii. of 'Sacred Books of the East,' p. xix.) writes thus of Baudhâyana, whom Sanscritists, Indian and European, generally regard as one of the oldest of the law-writers. 'Like many other ancient teachers, Baudhâyana permits childless Aryans to satisfy their craving for representatives bearing their name, and to allay their fears of falling after death into the regions of torment through a failure of the funeral oblations, by the affiliation of eleven kinds of substitutes for a legitimate son. Illegitimate sons, the illegitimate sons of wives, the legitimate and illegitimate offspring of daughters, and the children of relatives and even of strangers, who may be solemnly adopted or received as members of the family without any ceremony, are all allowed to take the place and the rights of legitimate sons.' I will proceed to examine this system of artificial affiliation at some length, together with its bearing on Inheritance in the embryo. Until the ideas upon which it rests have been carefully sifted, it seems to me doubtful whether all investigation of the primitive forms of society is not likely to be imperfect and premature.

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[2] See Chapter VII. (on 'Modern Theories of Primitive Society') below.

First of all, then, the person who offers the sacrifices with the best chance of efficacy in the world beyond the grave is the legitimate son, the son who is physically the offspring of his father and who, by preference, is born of a marriage blessed by Brahmans and contracted under all the conditions which their sacred law prescribes. And, among all sons, the eldest son is most likely to confer spiritual benefit on his father. Here, however, we come upon one of the most remarkable of the extensions which the sacerdotal lawyers give to their doctrine in order to prevent its miscarriage in particular cases. With the purpose of increasing the chance of there being legitimate sons to present the oblation, some among the oldest of these Brahmanical teachers relax the conditions of marriage, and show leniency to strange forms of wedlock, so numerous as almost to include all possible unions of the sexes. Some of these marriages are very strongly condemned by the later

Hindu law-writers; for example, marriage with a purchased bride; others, where they occur, are effectuated by violence or by fraud. Still, it is to be observed that the children of all these unions would be physically the children of the husband; and the father and mother, however barbarous their connection, are probably understood to have been unmarried before it.

Among all the sons sprung from the father, the eldest is preferred. The sacerdotal reason assigned by the Hindu lawyers is that, by his birth, the religious obligation to have a son who can continue the chain which binds together the living and the dead has been satisfied. But the privileges of inheritance corresponding to this spiritual primacy are very variously defined in the law-books, and, even when they approach somewhat to modern primogeniture, they are still very unlike it. Sometimes the eldest son is spoken of as taking the whole inheritance of his father and supporting the rest of the family, and this is very probably the secular custom for which the priestly lawyers invented a religious reason. More often, the best portion, or some similar advantage, is assigned to the eldest of the sons, and sometimes alternative modes of providing for him are stated. Of two ancient authorities, Gautama defines his privileges in ambiguous and indeed contradictory language (see chap. xxviii.), while Apastamba, while admitting that Primogeniture gives advantages in certain countries, argues strongly for equal division among all the sons (II. vi. 14. 14). It seems to me that, at the epoch of these law-treatises, the ancient Primogeniture was decaying among the Hindus, as we know that it decayed in the barbarous world generally. Under the original usage, the eldest son may have taken everything and maintained his brethren; but the Brahmans, as I have explained, were strong partisans of multiplied households, and this feeling must have militated powerfully against the privileges of the eldest. On the whole, the doctrine which tends to prevail is that the division should be equal among sons, with a small advantage to the eldest as the divider of the inheritance, which may have been meant as an inducement to fairness.

Next to the legitimate sons, as proper vehicles for spiritual blessing, the greater number of the ancient Hindu law-writers place the son of the wife, born during her marriage but not necessarily of her husband. At first sight this looks like an application of the long-descended legal maxim, '*pater est quem nuptiæ demonstrant*,' but all the ancient texts taken together suggest a different explanation, and I will consider the 'son of the wife' again when I come to the son of the widow.

The person who, on failure of all the inheritors I have mentioned, can next in order offer the sacrifices for the deceased and claim his succession, is the son of his 'appointed' daughter. It is an interesting case for a variety of reasons. The son of a daughter, regarded by himself, would not satisfy the requirements either of a successor or of a worshipper. From the secular point of view, he is, in Roman phrase, a 'cognate,' a kinsman through women only, who, according to the usage prevailing among all the more powerful races of mankind either from the first or in a certain stage of their development, cannot continue the family. The religious theory of ancestor-worship would not take any notice of him, for the parent to whom he would sacrifice would be a woman, and women could not in the earliest times be objects of worship, and never at any time by themselves. But the ancient law allowed the father, who had no prospect of having legitimate sons, to 'appoint' or nominate a daughter who should bear a son to himself and not to her own husband. Apparently this appointment could be made against the husband's will, for one of our oldest authorities warns the Hindu against marrying a girl who has no brothers, because her father may 'appoint' her, and her husband may have his own naturally-born son converted into the son of the maternal grandfather. The sacerdotal formula of appointment is given in Gautama, XXVIII. 19. 18: 'A father who has no male offspring may appoint his daughter to raise up a son for him, presenting burnt offerings to Agni and to Pragâpati, the lord of creatures, and addressing the bridegroom with these words, "For me be thy male offspring."' 'Some declare,' adds the writer, 'that a daughter becomes an appointed daughter solely by the intention of the father.'

Some customs near akin to the Hindu usage of 'appointing' a daughter appear to have been very widely diffused over the ancient world, and traces of them are found far down in history. The daughter here becomes neither the true successor of her father nor the priestess of his worship, but a channel through which his blood passes to a male child, capable, according to the oldest notions, of sacrificing to him; and, according to the newer ideas, of taking his property and preserving the continuity of the household. At first there was always, I should imagine, some expression of the father's will, coupled with some religious ceremony. Among the Athenians, when our knowledge of their law begins, the Testament or Will has appeared, though its operation is much limited. An Athenian father, fearing sonlessness, might have a son raised up to him by a daughter; and the commonest mode of effecting this object was by devising his property—or, to speak more strictly, the property and the daughter together—to a person selected by himself on condition of marrying her. The son born of the marriage was, on coming of age, transferred to the family of his maternal grandfather—it would seem, with some of the forms of adoption—and took his name, becoming at the same time the legal representative (κύριος) of his own mother. This is essentially the same method of obtaining a male child which was anciently in use with the Hindus. But some such practice must have been followed, and some such ideas must have prevailed among a certain portion of the barbarous communities which contributed their usages to the enormous body of rules finally consolidated as the Feudal Law. According to some systems of mediæval customary law, daughters succeeded, either in order of primogeniture or in a group, when sons had failed. According to others, they were excluded altogether. But between these doctrines there was an intermediate view, that a daughter, though she could not succeed herself, could transmit a right of succession to her male children. Hereafter, I shall have occasion to point out that this was the rule on which our Edward III. based his claim to the throne of France; he admitted that the French princess, who was his mother, could not succeed, but he contended that he himself, as her son, was entitled to succeed his maternal grandfather. This argument did not prevail either in the forum of arms or in the opinion of the feudal lawyers; but it seems to be clearly connected with the range of legal notions before us.

The chief interest of the Hindu 'appointment,' and of the counterparts of it in the law of other races, lies in their probably marking one of the points at which the right of women to inherit made its way into the strict agnatic systems of kinship and succession which prevailed among the more advanced of the barbarous societies. The Brahman compiler of Manu, while speaking of the appointed daughter, uses language which seems to show the natural growth of feeling: 'The son of a man is even as himself, and as the son so is the daughter ('thus appointed' adds the commentator): how then, if he have no son, can any inherit his property but a daughter who is closely united with his own soul?' As the law developed itself, the most general result finally attained was that daughters inherited when sons had failed. But it was not reached at once. Among the ancient Hindu writers, Baudhâyana seems to have wholly denied the right of women to inherit: Apastamba places the daughter at the very end of the list of inheritors, but the more modern Vishnu introduces both mother and daughter immediately after the sons. In works treating of the Athenian law, it is usually stated that when there were no sons daughters succeeded. But this is not an adequate statement of the rule. The daughter of a man who left property but no sons, was not in strictness his heiress. She was, as her Greek name (ἐπίκληρος) indicates, a 'person who went with the property.'[3] As I have said above, her father might compel her by testament to marry the devisee of her share; but, if he died intestate, she was subject to another liability—marriage to his nearest kinsman—which connects itself with some singular branches of our subject to be discussed presently. In all these Athenian rules, it is to be observed that, while the ancestral sacrifices are constantly mentioned, the object of special care is the devolution of the estate in the household. The religious basis tends to drop away from the law. Indeed, the wish to prevent daughters from carrying off the patrimony of one household to another is not at all a feature exclusively of sacerdotalised bodies of usage. The secular law of the unsacerdotalised Hindus of the Punjab applies the same principle and exhibits some instructive variants of the Athenian rules ('Notes on Punjab Customary Law,' vol. ii. pp. 75, 81, 184, 239). Under some Punjab usages, the daughter, when there are no sons, inherits a limited interest in her father's property; but she must resign it when she marries. It is usual, however, for the husband of such a daughter to be adopted by his father-in-law.

The legitimate sons, and the son of an 'appointed' daughter, have in their veins the blood of the father to whom they sacrifice and succeed. But when there are no sons, and when there has been no appointment of a daughter, we are introduced by the law-books to a number of possible successors whose sonship is altogether fictitious. I know no part of the ancient Hindu law more curious than this, or demanding more imperatively to be taken into careful account by all who investigate the beginnings of organised human society. That ancient family law is entangled with fictions has long been known. (See my 'Ancient Law,' p. 130.) One of them has been so long before our eyes as to be comparatively familiar to us. This is Adoption, the engrafting on the family a son from a strange house. Its importance as a private institution at Rome and Athens is of course well known to students; and, among the Romans of the Empire, it became politically important in a high degree as one of the chief expedients for bringing about the peaceable succession of Prince to Prince. It is true that to Englishmen, nowadays, it is little more than a name; to adopt a child is to nurture and educate it, and perhaps to provide for it by Will. But in the French Civil Code (liv. i. 8; tit. 8, c. 1), and other Continental Codes founded on the French, Adoption survives as an institution: a childless man, though under somewhat severely restrictive conditions, may take to himself an adoptive child who will be entitled to succeed to his property. This familiarity with Adoption, during such a length of history, blinds us to the fact that it is one of the most violent of fictions. The faculty of accepting them, strong as it is in ancient communities, must have been strained to the utmost when, for the purpose of taking part in the most solemn of religious ceremonies and earning a consequent right of inheritance, a strange child was transferred to the household, or a man alien in blood was permitted to enter it voluntarily. No doubt, in the more recent practice of the societies accustomed to the adoption of children, the violence of the fiction is somewhat diminished. The theory may be that the child adopted is a stranger, at most of the same order or caste as the person adopting him, but in India he is generally a blood-relation of some kind; and, on looking through a list of known Roman adoptions, the large majority will be seen to be instances of the adoption of 'cognatic' kinsmen—that is, of relatives through women. But the ancient feeling on the subject may be inferred from the place which simple adoption occupies in the list of expedients for continuing the family of a childless father as set forth in these early Hindu law-books. 'There is a singular disproportion,' says Mr. J. D. Mayne, 'between the space necessarily devoted to adoption in the English works on Hindu law, and that which it occupies in the early law-books. One might read through all the texts from the Sutra writers down to the Daya-Bhaga without discovering that adoption is a matter of any prominence in the Hindu system' ('Hindu Law,' p. 81). The truth is, that by its side there are a number of fictitious affiliations which were of at least equal antiquity with Adoption, and which, I suspect, served its object even more completely in very ancient times. They are startling or revolting to modern sentiment, but they seemed perhaps simpler and more natural to ancient thought than the admission of a mere stranger to the family.

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[3] See Jebb, *Attic Orators*, ii. 318.

These fictitious sons are called by Gautama (XXVIII. 32) the 'son born secretly,' the 'son of an unmarried damsel,' the 'son of a pregnant bride,' and the son of a 'twice married woman.' It is sufficient to say of them that none of them are necessarily the sons of the father whom they are permitted to worship after his death, while some of them cannot possibly be his children. They are all, to use modern words, illegitimate or adulterine offspring, but then they are all the offspring of women who are under the shelter of the household, or who are brought under it. These women are under the protection of its head; they belong to him, and the status of their children is settled by the well-known rule which, in Roman law, would settle the status of a slave. Here it is that these strange usages link themselves to familiar phenomena of primitive societies. Paternal power and protective power are inextricably blended together: even the Slave is in some sense a member of the family. We know in fact that at Rome a Slave could perform the family sacrifices on his master's death; and it was a common contrivance of men who expected to die insolvent to nominate a slave as the heir in the last resort, in order that the bankruptcy of the estate might be declared in his name. Thus, on the secular side, these fictitious sons are permitted to rank as in some remote sense sons, because they are born of women protected by the head of the household, and because they are themselves protected by him. On the religious side, they are permitted to offer the ancestral sacrifices as a desperate expedient for preserving the ancestor from a total failure of male offspring, and from the terrible consequences of entering the world of the dead without the proper oblations and rites.

It must be, however, understood that strong moral repugnance to the fictitious affiliation of these illegitimate and adulterine children begins to show itself among the oldest of the Hindu law-writers whose treatises have survived. A very ancient authority, Apastamba, gives no list of them, protests against the principle, and lays down broadly that 'the son belongs to the begetter.' Even the writers who mention them vary greatly as to their place in the order of succession, and Manu aims at them the remark (IX. 161) that 'such advantage as a man would gain who should attempt to pass deep water in a boat made of woven reeds, that father obtains who passes the gloom of death leaving only contemptible sons.' I cannot doubt that the growing popularity of Adoption, as a method of obtaining a fictitious son, was due to moral dislike of the other modes of affiliation which was steadily rising among the Brahman teachers in the law-schools.

Let us now suppose the head of the household to have died without having left a son, without having appointed a daughter, without having taken a son in adoption, without male children born in the house who can satisfy the fiction of sonship,—is there any escape possible from the dreaded consequences of failure in the family succession and the ancestral sacrifices? In the opinion of some of the Hindu doctors, these consequences might be averted by an institution which has lately received a great deal of attention, known commonly as the Levirate, but called by the Hindus, in its more general form, the Niyoga. Under it, a son is born to a childless man of his wife or his widow, not from the husband himself but from his brother or nearest kinsman. The practice of so obtaining a son appears to have extended, with various modifications and with or without the religious sanction, over many branches of the human race. We come upon faint but still recognisable traces of it in the law of the Spartans and Athenians, and in one of its forms it was certainly followed by the Hebrews.

The Levirate, under which the son is born to the dead man from his brother, 'that his name be not put out of Israel,' is best known to Englishmen from the casuistical question of the Sadducees in the twenty-second chapter of St. Matthew (v. 24 *et seq.*): 'Master, Moses said, If a man die, having no children, his brother shall marry his wife and raise up seed to his brother. Now there were with us seven brethren; and the first, when he married, deceased and, having no seed, he left his wife unto his brother: Likewise the second also, and the third, unto the seventh. And after them all, the woman died. In the Resurrection, therefore, whose wife shall she be of the seven? for they all had her.' In the passage here expressly referred to (Deuteronomy xxv. 5) the duty of the husband's brother is declared to be imperative. 'If brethren dwell together, and one of them die and have no child, the wife of the dead shall not marry without unto a stranger: her husband's brother shall go in unto her, and take her to wife, and perform the duty of a husband's brother unto her. And it shall be that the first-born which she beareth shall succeed in the name of his brother which is dead, that his name be not put out of Israel.' The verses which succeed describe the procedure which is to be followed when the brother-in-law declines the obligation; and this procedure, consisting chiefly of a symbolic plucking off of the shoe, reappears in the Book of Ruth, where the idyllic beauty of the story sometimes blinds the reader to the fact it is meant to illustrate, a legal rule which was important in its bearing on a passage in the genealogical history of the Royal House of Judah. The most ancient form of the institution appears, however, to be that which is described by the oldest of the Hindu law-writers. ‘A woman whose husband is dead and who desires offspring may bear a son to her brother-in-law. Let her obtain the permission of her Gurus (that is, her spiritual directors). On failure of a brother-in-law, she may obtain offspring by cohabiting with a Sapinda, a Sagotra (a Roman would have said, an ‘Agnatus’ or ‘Gentilis’), a Samânapravara (that is, one of the same literary or sacerdotal clan as her husband), or one who belongs to the same caste. Some declare that she shall cohabit with nobody but a brother-in-law.’ It is to be remarked that Gautama does not appear to contemplate that the widow will necessarily become the wife of the Levir, and that, as in the Book of Ruth, the obligation is extended by him to kinsmen remoter than a brother-in-law, though he notices the opinion that a brother-in-law alone can raise up seed to his brother (Gautama, XVIII. 6 *et seq.*)

But the practice here and there received an extension even more revolting to modern delicacy than the shape which it takes in the Levirate. ‘The child begotten at a living husband's request, on his wife,’ says

Gautama (XVIII. 11), 'belongs to the husband.' There are several instances of such requests referred to in the Sanscrit literature, but the practice, when defined as an institution by the lawyers, strictly required that the natural father of the child should always be a kinsman. Gautama immediately adds to the passage just quoted, 'If the natural father of the child was a stranger, that is not of kin to the husband, it belongs to the stranger.' And, again, in his list of sons, this ancient writer places the 'son begotten on the wife by a kinsman.' It would appear, as I shall have to point out presently, that Hindu sacerdotal feeling was divided from the very earliest times on the morality of the Niyoga; but we must bear in mind that its coarser form was not necessarily more repugnant to the old teachers than the form which seems to us somewhat less offensive. No doubt the birth of the son from the widow does not revolt so much as his birth from the wife. But then the ancient law made little difference between the husband's old age and his death. It is assumed that an old man will quit his house and family and withdraw to spend the residue of his life in asceticism; and the fittest moment for retirement is frequently described as the time at which he becomes incapable of fatherhood.

There are some vestiges of the class of functions assigned by the Niyoga to the nearest kinsman in the records of both the great States of Greece. A well-known story told by Plutarch ('Pyrrhus,' 26) of the relations between a brilliant Lacedæmonian officer, Acrotatus, and Chelidonis, the wife of Cleonymus, and of the way in which the old men of Sparta applauded these relations and invoked blessings on the offspring of Chelidonis, does assuredly suggest that, in that old-fashioned and never very delicate society, some institution like that of the ancient Hindus survived till the third century before Christ. Cleonymus was an aged man, and Acrotatus, his grand-nephew, seems to have been his nearest male relative in the flower of life. At Athens, the most nearly corresponding institution differed considerably from the Hindu form. I have stated that an Athenian father might provide, like an Hindu, for the continuance of his family through the son of a daughter; but if, dying sonless and intestate, he allowed his property to descend to a daughter without special arrangement, she became the Orphan Heiress (or ἐπίκληρος), who makes a great figure in Attic law. She had no power of choosing a husband for herself, but it was the right of her nearest kinsman to marry her and his duty to marry or portion her. The right seems in fact to have been keenly disputed; there was a special proceeding (or διαδικασία) for deciding between different claimants, and men often divorced their wives in order to marry the heiress. The same principle was applied to a group of daughters, whom their various kinsmen in order of proximity had to marry or provide with a portion. The object, of course, is to keep the property in the family, and, if possible, to provide that the daughter's children should derive a stream of its blood from male descents. An even more remarkable application of the principle occurred when the children left were a brother and sister. In such a case the duty of the brother was to portion the sister, but if she were only a half-sister, the strong Athenian feeling against the marriage of brothers and sisters had to give way, and he might marry her and save the portion to the estate. This power could not, however, be exercised, if the sister were uterine, that is, a child by the same mother though not by the same father; and this limitation has been thought a survival of the remote age at which the Athenians counted kinship through females only. But marriage with an uterine sister would have no tendency to promote the object aimed at. She would have no rights over the father's estate, and marrying her would not help to keep it from diminution and to preserve in its integrity the fund for the ancestral sacrifices.[4] Let me repeat that, in most of the Athenian rules about the rights and duties of the nearest kinsman, we have illustrations of the tendency, manifest also in the last chapter of the Book of Ruth, of ancient contrivances for continuing the family to become mere modes of succession to property.

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[4] This is the explanation of M. Fustel de Coulanges (C[illegible] *Antique*, p. 83), which seems to me conclusive. He observe[illegible] an emancipated son did not enjoy the privilege. [illegible]nst it.

A few words will not be thrown away on the probable origin and meaning of this group of institutions. The Levirate, which is a special case of the Niyoga and under which one brother raises up seed to another, has had a definite place assigned to it by the late Mr. J. F. McLennan in the evolution of society. Originally, I understand him to lay down, there was promiscuity in the relations of the sexes. This promiscuity became limited by Polyandry,[5] one wife having several husbands. These plural husbands came in time to be always brothers, and the Levirate is a relic of this form of Polyandry. It would not be quite easy to bring all forms of the Niyoga (of which the Levirate is, as I have said, only a special case) under this ingenious theory; but I will confine myself to saying that the explanation is not the one suggested, to my mind at all events, by the antiquities of Hindu law. Let us suppose that in a particular society an intense desire has arisen for male issue, whether through its worship of ancestors or otherwise. Let us assume that in a particular case
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[5] See Note B, 'Polyandry.'

actual issue of the father's loins is impossible. There are no daughters. The accepted fictions, by which sons are created for the sacrifice, cannot be made serviceable. What is to be done, that the name of the aged or dead man be not put out on earth nor his lot placed in jeopardy beyond the grave? Now all ancient opinion, religious or legal, is strongly influenced by analogies, and the child born through the Niyoga is very like a real son. Like a real son, he is born of the wife or the widow; and, though he has not in him the blood of the husband, he has in him the blood of the husband's race. The blood of the individual cannot be continued, but the blood of the household flows on. It seems to me very natural for an ancient authority on customary law to hold that under such circumstances the family was properly continued, and for a priest or sacerdotal lawyer to suppose that the funeral rites would be performed by the son of the widow or of the wife with a reasonable prospect of ensuring their object. The very differences of opinion which arose on the subject in the most ancient Brahmanical law-schools seem to me exactly those which would be provoked by a plausible and yet non-natural contrivance. There was a division of opinion about the Niyoga, especially in its more offensive shape, from the very first. Apastamba condemns it in the strongest language, while Baudhâyana and Gautama have nothing to say against it.

Manu, in a later age, declares it is only fit for cattle (IX. 65. 66), but Narada, a still more recent authority, almost pervaded by the modern spirit, takes it as a matter of course.

I have stated that, in my opinion, the capacity which came to be recognised in daughters, to transmit to a male child the religious quality of sonship to his maternal grandfather, is connected with the ultimate admission of female descendants to a share in the inheritance It seems to me, further, a plausible conjecture that the capacity of the widow to produce a son to her deceased husband through the Levirate has helped to confer on her the life-interest in her husband's property which she enjoys in parts of India ; and has also led to the power very generally vested in her by Hindu law and usage of taking a son to her deceased husband by simple adoption. My subject, however, is the dependence of inheritance on ancestor-worship, and these topics are too far removed from it to be fitly discussed at present. In any inquiry into the origins of the succession of daughters to their father's estate, it would be necessary to examine the practice of giving them portions on their marriage which prevailed widely in the ancient world. The gift to a woman or the provision for her on her marriage cannot be separated from her right of succession. Speaking generally, they are alternative modes of providing for her ; and the exclusion of daughters from inheritance in ancient systems of law constantly means that they have a right to be portioned, as a rule, out of the movable property of a family. The ancient Hindu writers scarcely mention the daughter's succession. Baudhâyana, it is thought, held the opinion that no woman could inherit. Apastamba brings in the daughter not only after the male relatives, but after such remote successors as the religious teacher and the fellow-pupil of the deceased. But still these writers implicitly recognise some separate property in married women (Gautama, XXVIII. 24). In the ancient legal systems of the Western world there is a visible connection between inheritance and provision upon marriage. Under Athenian law, when sons have failed and the father has died intestate, daughters must be either married to kinsmen, or portioned by them under the system which I have described. The ancient Roman law, at the earliest stage at which we know it, is thought to have allowed some share of their father's inheritance to daughters. But the Roman law has bequeathed to modern jurisprudence the doctrine[6] that, under certain circumstances, a marriage portion is to be deemed an 'advance' of a legacy to a daughter, and, conversely, that a covenant to settle a portion is 'satisfied' by a legacy. I have always suspected that this doctrine inverted the principle of the

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[6] See *Dig.* XXX. 84, 6. *Cod.* vi. 37, 11.

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oldest law ; and that, anciently, the daughter only succeeded when she had not been portioned. In the Joint-Families of modern India, and in the Slavonian House-Communities, though the estate may be regarded as belonging to the male members of the household, the women are entitled to a portion on marriage, generally amounting to some definite fraction of the share which their brothers would receive on a division ; and in India, when the property of a joint-family is distributed, the law saddles the shares with a liability to 'maintain' the unmarried women and widows. Nowhere, so far as I know, are women left without provision in ancient societies which have made even a slight degree of advance. The real prejudice or reluctance is against allowing them to confer on their husbands, to whom they are generally married in infancy, any rights over the kind of property, such as land, by which the community lives and holds together. But a provision for them by means of property which is actually movable and transferable is thought not merely just and fair, but so imperatively required that it would be a violation of decency and a blot on the family honour to omit or refuse to provide it.

We have now come to the point at which, if there were any close analogy between a modern legal writer and these ancient expositors of the Brahmanical sacred law, they would take up for discussion (1) the succession of ascendants of the deceased, of his male paternal ancestors, if any survived him, and (2) the succession of collaterals—that is, of the descendants of his paternal ancestors. The second of these subjects, Collateral Succession, has attained a vast extent and complexity in the modern[7] law of the Hindus ; and on the whole its importance has increased rather than diminished in Western Europe. Englishmen are less interested in Collateral Succession than other peoples, and, indeed, it may be said in all succession by law, through their almost universal habit of determining the devolution of their property by marriage-settlements or wills. But on the Continent, principally through the operation of the French Code and of the Codes modelled on it, the practice of testamentary disposition is said to be on the decline. The rights over the father's property secured to children are indefeasible, and the chief modern object of a Will, the distribution of property among children according to their character and needs, being thus unattainable, Wills fall into disuse and the law is left to settle the succession of more distant relatives. It shows the remoteness of the legal ideas which I am examining from those now prevalent, that the ancient lawyers before us hardly notice collateral succession. They provide for the ultimate succession, on failure of nearer claimants, of spiritual kinsmen, the Brahman teacher, and the fellow-pupil, and for the succession of the King, but they say hardly anything of Inheritance as now understood, save in the direct line of descent or ascent. Their language on the remoter succession of blood relations is brief and obscure, and they do not use technical terms in the same sense, or in the sense of the modern Hindu law.[8] They pass rapidly to the spiritual inheritors whom I have named, and to the King; and one of them adds that 'in cases for which no rule has been given that course must be followed of which at least ten Brahmans, who are well instructed, skilled in reasoning, and free from covetousness, approve' (Gautama, XXVIII. 48).

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[7] The existing Hindu law on the subject, with the principles on which the two rival sets of doctrines depend, is discussed by Mr. J. D. Mayne in a most instructive chapter (xvi.) of his *Hindu Law and Usage*.

The brevity and obscurity of the early law-teachers on certain topics have been accounted for by the assumed purpose of their treatises, which is to give a compendious summary of the law in aphoristic language. It is to be observed, however, that they are full and clear enough on all subjects to which they attach importance. It is, I think, impossible not to see that, so far as regards collateral succession, they were little interested in it. The truth seems to me to be that they trusted, for the proper devolution of the inheritance, to their various contrivances for providing a son when legitimate sons had failed, to the appointment of a daughter, to their fictions of sonship, to adoption and to the Niyoga. It is probable that at first an efficacious sacrifice to the dead could only be offered by a descendant in the direct line; and though some of the artificial methods of obtaining a worshipping representative were disapproved of, it is very likely that a collateral relative could not originally sacrifice at all with any prospect of conferring or receiving spiritual benefit. But all the artificial expedients, save one, for providing sons have long since been exploded in India. They are not permitted, says the orthodox Hindu doctor, in the Iron Age in which we now live, because of the hardness of men's hearts. As a matter of fact, a current of feeling adverse to some or all of them runs through the most ancient of the law-books, and this is the source of the opinion which has ultimately prevailed. Nowadays, if a man has no legitimate sons, he has no resource but adoption, either by himself or his widow, and there are local disputes whether the widow requires his consent or directions to be given before he dies, and if she requires it, in what form it should be given. Such a state of the law adds greatly to the modern importance of collateral succession, and there are facts which co-operate with the law. There is marked infertility among Hindus of high rank, and, though there may be a theoretical preference for adopting a son rather than allow the succession to go to a collateral, yet (as I am informed) there is a great deal of the same superstitious disrelish for effecting an adoption which is known sometimes to prevent in England the making of a will.

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[8] The familiar terms of the mature Hindu law indicating classes of inheritors (Sapinda, Sagotra, &c) occur in these writers, but not apparently in the more modern sense. A text attributed to Baudhâyana defines 'Sapinda' as 'the paternal grandfather, grandfather, the father, the man himself, his uterine brother by a woman of equal caste (that is, the son of his father by the same mother as himself, provided she be of equal caste with her husband), his son, his son's son, and the son of the grandson.' But this cannot be the meaning of Sapinda in Gautama (XIV. 13, and XVIII. 6). Vishnu seems to employ Sapinda and Bandhu as synonymous (XVII. 10).

The original authorities for the very extensive body of modern rules governing the succession of collateral relatives are far less the ancient law-books than the so-called mediæval Digests, dating approximately from the eleventh to the fourteenth century, of which the most archaic is the 'Mitakshara.' The most general feature of this body of rules is thus described by Mr. J. D. Mayne ('Hindu Law and Usage,' p. 51): 'Except in Bengal, agnates, kinsmen connected through male descents, exclude cognates, kinsmen through females, to the fourteenth degree.' The same preference for males is observable in the rules of succession shown to prevail in the Punjab, where law and usage are 'essentially unsacerdotal, unsacramental, secular.' The judicial experience of the Chief Court of the Punjab here coincides with the conclusions of the official inquirers, and establishes that 'kinship is wholly agnatic.'[9] There can be no doubt, therefore, that agnatic succession among collaterals is the general principle of Hindu usage. It was the exclusive principle of the Roman law under the Twelve Tables, and it governed the remoter collateral successions under the law of Athens, which prescribed that agnates should always have precedence over cognates (*προτιμᾶσθαι τοὺς ἀπὸ τῶν ἀῤῥένων τῶν ἀπὸ θηλείων*). Indeed, if a comparatively recent writer[1] may be trusted, agnatic succession, succession through males exclusively, was, if I may so put it, the common law of Greece.

But one remarkable exception to this general preference for males in India is specified by Mr. Mayne. In the populous province of Bengal Proper, also noticeable for the nearly total disappearance of the Village Community, cognates are largely admitted to succeed, and sometimes in preference to agnates. 'Heirs in the female line frequently take before very near Sapindas in the direct male line' ('Hindu Law and Usage,' p. 428). Mr. Mayne has very copiously illustrated this peculiarity of Bengal law, and traced it to its causes, in his sixteenth chapter. The relatively modern authorities followed by the Brahmanical lawyers of that province—the Daya-Bhaga and Daya-Krama-Sangraha—are charged with sacerdotal doctrine. They display not only a close connection between ancestor-worship and inheritance, but a complete dependence of the last upon the first. The first question is, What is the exact amount of spiritual benefit received by the ancestor from the sacrifices, and what is the precise amount reflected on the worshipper?—and this is an accurate measure of the place of the worshipper in the table of succession.

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[9] See Boulnois and Rattigan, *Notes on Punjab Law*, p. 85.

[1] Diodorus Siculus, xii. 14 (commenting on a probably spurious law attributed to Charondas).

The explanation seems to me to be that the original Ancestor-worship transformed itself, and in the course of change helped to modify the law, but did not affect all the stream of legal doctrine in the same degree. Originally, it cannot be doubted, the ancestor worshipped was a male, and the worshipper was his direct male descendant through males. Again, nothing can be stronger than the denials of the right of any woman to offer a sacrifice which we find in the ancient writers. 'A female shall not offer any burnt oblation' (Apastamba, II. vi. 15. 18). But, as I pointed out before, there seems to have arisen in time a practice of associating the ancestor's wife with the ancestor as an object of worship. 'A man must fare by himself in the other world,' say the Hindu doctors. 'Even were he to die with him, a kinsman cannot follow his dead relative.'[2] 'All, *excepting his wife*, are forbidden to follow him on the path of Yama'—a passage which in later times became one of the chief authorities for the burning of the widow. Thus in early, but still not in the most ancient, times, men are found worshipping their mother as well as their father, and also their maternal ancestors, though without quite putting them on the same footing as their ancestors through males. One great breach was thus made in the ancient system. Another transformation of religious ideas, which did not perhaps extend beyond particular Brahmanical schools, may be traced in the Daya-Bhaga. The growing moral dissatisfaction with the artificial modes of procuring sons must have increased the chance of childlessness, and therefore of a failure in the sacrifices. Such a prospective result, drawing with it not only supernatural penalties on the dead, but secular losses to the Brahmans, would tend to produce or strengthen the belief that mere collaterals might efficaciously offer sacrificial honour to the dead, and, further, would aid in enlarging the view of collateral relationship as widely as possible. This, in fact, is the religious system shadowed forth in the treatises of authority in Bengal. It is a system aimed, among other things, at bringing as large a number of relatives as possible, including cognates, or kinsfolk through women, within the circle of more or less efficacious worshippers. It is moreover a system full of that minute detail and of those subtle inferences from supposed principles which are characteristic of a highly developed religion which has long since departed from its original simplicity. I must leave the distinctions between the oblation of an entire funeral cake, the offering of the fragments left on the hands and wiped off them, and the mere libation of water, together with the corresponding distinctions between the classes of relatives admitted to the succession, to be studied in the books of professed writers on Hindu law, and especially in the works of Mr. J. D. Mayne and of Professor Rajkumar Sarvadhikari.

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[2] Vishnu, xx. 30.

I have already stated my belief that at the back of the ancestor-worship practised by Hindus there lay a system of agnation, or kinship through males only, such as now survives in the Punjab. I so far agree with the theory of M. Fustel de Coulanges that I believe this system to have been at first greatly strengthened by ancestor-worship. But it seems to me plain that ancestor-worship in its later growth, acted as a weakening and dissolving force upon the ancient kinship and the ancient family. The secular law followed by Hindus was not, however, equally or universally affected by the religious development. The Mitakshara, which is, on the whole, of more authority in India than the Daya-Bhaga, is manifestly based in the main upon the more ancient conception of kinship. At the same time I do not regard the system of the Daya-Bhaga as simply an after-growth of the system reflected in the more archaic treatise. It is rather a separate development of the ancient sacerdotal law. The ideas which led to it are more or less discernible in the oldest treatises, but they seem to have been carried to their consequences in some law-schools more rapidly and completely than others. Nobody will understand the relatively late collection of rules called after Manu, who does not recognise that it has been materially affected by the religious transformation.

Among the forces which have caused and directed the progress of human society, one of the most powerful has been the Edict of the Roman Prætor, which gradually brought law into harmony with a set of principles known under their most general designation as Equity. It completely transmuted the Roman jurisprudence; and the system, formed by its infiltration into older rules, is the fountain of nearly all modern Continental law, of some part of the English law, and of the greatest part of the existing Law of Nations. These principles were finally considered by the Roman lawyers to fit in with a Greek philosophical conception, the Law of Nature, which was destined to have a serious influence on human thought down to our own days. At an earlier stage of legal opinion the

Prætor's Edict was thought to embody the Jus Gentium, a supposed generalisation of the usages of a great part of mankind. But of the most ancient history of the Roman Equity we cannot be said to know anything. We have evidence, however, that the Edict was employed in very early times to transform the Roman law of Inheritance, founding it on a view of kinship very faintly recognised previously or not at all. Now I, at all events, cannot read the ancient Hindu law-tracts and compare them with such treatises as the Daya-Bhaga and Daya-Krama-Sangraha without being led to the conclusion that, in the interval between the two states of the law reflected in the older and the later books, a change has taken place among the Hindus extremely like that which has occurred among the Romans when the Agnatic Inheritance of the Twelve Tables had been altered into the Cognatic Succession of the Edict. But the ancient Roman law of inheritance was closely implicated with ancestor-worship. This at all events must be taken as placed beyond doubt by M. Fustel de Coulanges. The ancient Hindu law had undoubtedly the same basis, but it underwent in parts of India very much the same modifications as the Roman law, and became a system of inheritance, allowing kinsmen through females to inherit as well as kinsmen through males. The newer Hindu law, however, carries with it the explanation of its own origin; the religious element in it has been transmuted, and the law with it. I suggest, therefore, that the Roman Equity had its beginning before legal history began, in a modified ancestor-worship and a change in the religious constitution and religious duties of the family. There are no ancient philosophies, and perhaps not many modern philosophies, which may not be suspected of having their roots in a religion. The Athenian law corresponds in some of its rules of collateral succession to the later rather than to the earlier Roman law, and here, too, I suggest that a change was produced by an alteration of religious ideas.

NOTES AND ILLUSTRATIONS.

NOTE A.

HINDU PATRIA POTESTAS.

It is possible that the ancient sacerdotal writers, besides being led by the dependent position of their order into denying the multiplication of religious observances through the dissolution of tribal and joint family groups, were also desirous that the period at which each household broke up into several families should not be delayed till the death of its head. Their expectation is that the faithful Hindu, the man twice born through the study of the Scriptures, will retire in advanced years from active life and become an ascetic or a hermit. There are a few texts which have been thought to imply that the sons of an aged father could compel his retirement. Gautama (xv. 19), while condemning such a practice, perhaps admits its existence. But, whatever be the meaning of these texts, I cannot allow that they lend any countenance to an opinion that sons could compel a partition of the family property at any time against the will of their father. I regard them as exclusively applying to the case of a father who has reached an age at which it has become a religious duty for him to abandon secular life. The fulness of the ancient Hindu Patria Potestas may be safely inferred from the veneration which even a living father must have inspired under a system of ancestor-worship. At a much later date the law-book of Manu declares that 'Three persons—a wife, a son, and a slave—are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong' (Manu, VIII. 416). A still more recent, but still ancient, authority—Narada (v. 39)—says that a son is 'of age and independent in case his parents be dead; during their lifetime he is dependent, even though he be grown old.' And nowadays Mr. Nelson, speaking of the South of India, over which the crust of sacerdotal Hinduism is thin, describes the Patria Potestas, which he knows by observation, as the one great standing institution of the Hindu. 'It is the undoubted fact that among the so-called Hindus of the Madras province the father is looked upon by all at the present day as the Rajah or absolute sovereign of the family that depends upon him. He is entitled to reverence during life as he is to worship after his death. His word is law, to be obeyed without question or demur. He is really the 'master of the family,—of his wife, of his sons, of his slaves, and of his wealth' ('View of the Hindu Law,' p. 56). And, at p. 38, 'Resistance to the will of the father appears monstrous.'

NOTE B.

POLYANDRY.

I SHOULD be sorry to have it supposed that I doubt the existence of Polyandry, and specially in the form of a plurality of husbands who were brothers, as an occasional practice of the ancient world. The much-discussed story, in the Mahabharata, of Draupadi becoming the wife of the five Pandavi princes may be open to various interpretations (see Mayne's 'Hindu Law and Usage,' p. 52), but there is fairly good evidence (Polybius, xii. 7, 732, following Timæus) that the Spartans practised polyandry. What I doubt (with Mr. L. H. Morgan) is the importance of the place assigned by Mr. McLennan to polyandry in the evolution of society. It serves as a caution against being too much impressed by the antiquity of the Indian and Greek examples to be reminded that the President de Brosses accused the Venetian aristocracy of practising the polyandry of brothers in the early part of the eighteenth century ('Lettres Écrites d'Italie, tom. i. p. 157). The Spartan and Venetian aristocracies were both noted for their want of delicacy in sexual relations, and in both cases the cause of the practice seems to have been the levy of public taxation on separate households which did not come into existence without separate marriages. The usage seems to me one which circumstances overpowering morality and decency might at any time call into existence. It is known to have arisen in the native Indian army.

CHAPTER V.

ROYAL SUCCESSION AND THE SALIC LAW.

In the legal history of those Western societies which have passed through feudalism, Succession to Property and Succession to Thrones are intimately connected together. When Bruce and Baliol, with ten other competitors, conduct a litigation before Edward I. of England respecting the right to the Scottish Crown, the arguments are not distinguishable in principle from arguments on the inheritance of an ordinary fief, and in point of fact this famous dispute did settle some points in the law of succession to land all over the West. But the law systems of the East, which contain an elaborate law of succession to private property, contain little or nothing about succession to thrones. One reigning Mahommedan house, that of the Ottoman Sultans, has continued to our day a system of royal succession of the highest antiquity—that under which the eldest male relative is preferred in the succession to the son; but there is no clear connection between this rule and any part of the abundant private law of inheritance declared by the Mahommedan doctors. At most we may trace a resemblance in the places respectively assigned to the son and to the paternal uncle in the Mahommedan scheme. Indeed, of all systems of succession to property, the Mahommedan system is the most difficult to adjust to royal successions. It is a system of minute fractional division between a number of relatives whose grouping[1] nobody seems to me to have as yet successfully explained. I agree with Sir George Campbell, that it must have grown up among a race whose property was easily divided into units, and possibly consisted of flocks and herds; and, again, I think that Mr. Almaric Rumsey ('Mohammedan Law of Inheritance') has conclusively shown that its greatest apparent difficulties arise from the fact that, whatever was the algebraical knowledge of later Mahommedans, the earliest expositors of this law were ignorant of some simple principles in the manipulation of fractions. On the whole, we must at present be satisfied with the orthodox Mahommedan explanation of the rules, which is, that they rest upon separate utterances of authorities supposed to speak with Divine authority—of the Prophet, his companions, and those who talked with them; and that they are not therefore necessarily reducible to systematic order.

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[1] The difficulty is caused by the composition of the class of Mahommedan Inheritors known as the Sharers. The two remaining classes seem to exhibit the usual preference of Agnates to Cognates.

The Hindu law of succession has more authentic claims than that of the Mahommedans to a religious origin. Some of its principles can be applied without much difficulty to a royal succession; but nevertheless it is essentially a law of succession to private property. It is somewhat remarkable that we learn little from the ancient Hindu lawyers of the rules under which a King should succeed. For when they have once recognised the King as an important auxiliary of the Brahman, they are not chary of advice to him or of opinions on his duties. First of all, he is to execute justice and maintain truth. But much more than this is inculcated on him. Even so old an authority as Apastamba (II. x. 25. 1) tells him how to build a city and a palace. 'The palace shall stand in the heart of the town. In front of it there shall be a hall. That is called the Hall of Invitation. At a little distance from the town to the south he shall cause to be built an assembly house, with doors on the south and on the north sides, so that one can see what passes inside and outside. In all these three places fires shall burn constantly, and oblations shall be offered in them daily, or at the daily sacrifice of a householder. In this hall he shall put up his guests, at least those who are learned in the Vedas. Rooms, a couch, meat and drink should be given to them according to their good qualities. But let not the king live better than his spiritual directors or his ministers.' Elsewhere he is taught how to amuse himself with dice, 'in even numbers, made of vibhitaka wood;' how to appoint administrative deputies; how to reward successful generals. Gautama compendiously lays down that the king is 'master of all with the exception of Brahmans;' and in the later treatises, Vishnu and Manu, there are very long discussions on regal duties, the teacher even giving an account of the art of strategy and of the methods of taxation. But there is nothing about the way in which princes succeed to thrones, unless a trace of a rule be sought in a direction to a victorious king, 'not to extirpate the royal race' when he conquers a country, but to invest a prince of this race with the royal dignities. The modern Hindu applies his religious law to royal succession only by analogy, and he generally applies the oldest part of that law. The family customs which have grown up in Indian royal houses reflect the ancient rules, barely mentioned by our oldest authorities, on the subject of primogeniture and indivisible patrimony, and it is to be observed that they show a marked preference for Adoption over Collateral Succession.

The truth is, that for Oriental systems of succession to Thrones, we have to go to usages, older perhaps than the great religious movements which have swept from time to time over the East, and having, at all events, a history independent of the institutions to which these movements give birth. The real or pretended doubts, the bitter disputes, and the sanguinary wars which the application of these customs occasioned were once among the chief scourges of mankind in the countries in which they prevailed, but the area of such troubles has been much contracted by the British Indian Empire. Yet the Empire itself was only the other day mixed up with one controversy of the kind which might be taken as a typical example of its class. One can never be very sure how long any Indian events survive in English memory, and yet some of us should recollect the perplexity caused by the names and claims of the various Chiefs or Princes who appeared during three or four years in the newspaper correspondence as pretenders to sovereign authority in Afghanistan. We heard of the unhappy Shere Ali Khan who, after the first British success, retired from Cabul, his capital, only to die—of Yakub Khan, now a State-prisoner in India, who ruled at Cabul as Shere Ali's successor at the time of Sir Louis Cavagnari's assassination—of Abdurrhaman Khan, long an exile in Russia, who now wears the most distinct badge of modern Afghan sovereignty by holding the three great cities of Cabul, Candahar, and Herat—of Ayub Khan, who, after inflicting on British Indian troops the first defeat in the open field which they had suffered for seventy-eight years, was utterly routed by the victorious General Roberts, and who, after another success against his rival Abdurrhaman, was finally defeated and compelled to take refuge in Persia. There were also the obscurer names of Abdulla Jan, now dead, who was a younger son of Shere Ali Khan, and who was long accepted by all except his elder brother as his father's heir-apparent, and of Musa Khan, the son of Yakub, whom I have seen spoken of in the newspapers as the only legitimate claimant to the Afghan throne. All the princes I have named were in some sense pretenders to the throne, and they are all near kinsmen, being all descendants of Dost Mahomed Khan, against whom the British fought in the old Afghan war of forty-four years since, and in whose room they set up for a while a client of their own, Shah Suja. How was it that so many near relatives claimed to be the successors of the last reigning prince? Hardly one of them is entitled under the rules about succession to thrones to which we are accustomed. Shere Ali, after a hard struggle, succeeded his father, Dost Mahomed, but he was not his father's eldest son. Yakub Khan was not Shere Ali's eldest son, and he was all but supplanted by a much younger brother, Abdulla Jan, and was long imprisoned for questioning his claims. Abdurrhaman Khan, the now reigning Ameer, is not a son of Shere Ali at all, but the son of his elder brother, and yet not, it is thought, of his eldest brother. Ayub Khan, on the other hand, is a son of Shere Ali, but he is younger than his brother Yakub Khan, who has a son living, the Musa Khan who, as I said before, has been called the legitimate heir to the throne. How then come all these princes to be rivals of one another ? How is it that there is no rule, as with us, to regulate (as we should say) the descent of the Crown ?

The great difference between the East and West is that the Past of the West lives in the Present of the East. What we call barbarism is the infant state of our own civilisation. The rivalries of these Afghan princes bring us back to one of the oldest causes of war and bloodshed among men, the disputed succession to political sovereignty. And the source of these disputes is to be sought in an ancient fact too often neglected or forgotten. When political sovereignty first shows itself (and the stage of human history at which it shows itself is by no means the earliest ascertainable), this sovereignty is constantly seen to reside, not in an individual nor in any definite line of persons, but in a group of kinsmen, a House or Sept, or a Clan.

In Greek history, there is a later form of this sovereignty which has a name of its own ; it is called a hegemony, the political ascendency of some one city or community over a number of subject commonwealths. But in more ancient times the royal or ruling body was more often a group of kinsmen, a Clan, or a Sept, called in India a Joint Family. In the ancient world, this group of royal kinsmen had often a purely fictitious pedigree, and pretended to be descended from a god; and there is an example of this claim in our own day, since the Emperor or Mikado of Japan, who has a Minister at the English Court, lays claim to a divine ancestry. Sometimes, however, the reigning House consists of the descendants of a known historical hero, as was the case with the most illustrious of all royal families, the Jewish princes descended from David, the son of Jesse. And just as among the Hebrews there were two rival royal clans, the princes of Judah and the princes of Israel, so also there have been rival clans pretending to the Afghan throne, and the old Afghan war was not so much a struggle between Dost Mahomed and Shah Suja as between the clans to which these chiefs belonged, the Suddozies and the Barukzies. Bloody wars have frequently been fought between the partisans of rival clans and houses, but in somewhat later times civil strife has chiefly raged between individual pretenders belonging to the same house. The reason of this is, that there are few things on which mankind were at first less agreed, few things on which their usages were less at one, than the rule which should determine which of the family should have its headship. We are so used to some form or other of Primogeniture as the system which regulates the devolution of crowns that we have some difficulty in understanding the ancient disputes of which I have spoken. Yet Primogeniture—to which as a *political* institution I may observe that the human race has been deeply indebted—did not at first appear in anything like the shape in which we are familiar with it; and, even when it approached that shape, its rules were subject to many uncertainties. On all sides we find evidence that, in the beginnings of history, quarrels were rife within reigning families as to the particular rule or usage which should invest one of the royal kinsmen with a primacy over the rest; and these quarrels bore fruit in civil wars. The commonest type of an ancient civil war was one in which the royal family quarrelled among themselves and the nobility or the people took sides. The madness of rivalry took possession of the chiefs and the people were smitten.

A very ancient, possibly the most ancient, method of settling these quarrels was that which has been called in our day Natural Selection. The competing chiefs fought it out, and the ablest, or the strongest, or the luckiest, lifted himself into supremacy. Now and then, one of the kinsmen has had the opportunity of crushing the others by a sudden blow, and this is the case of those massacres of princes which from time to time appear in Oriental history. One of them is described in that story in the Hebrew Chronicles which gives its plot to Racine's fine play of 'Athalie.' Athaliah, the queen-mother in Judah, that 'wicked woman,' seeing that her son King Ahaziah was dead, arose and destroyed all the seed royal of the house of Judah. One child was saved and hidden in the house of God six years: and Athaliah reigned over the land (2 Chron. xxii. 10). More revolting, because more systematic, were the massacres of their near collateral relatives by the Ottoman Sultans; but the Turk who bore no brother near his throne had his excuse in a peculiar rule of royal succession of which I will say something presently. The atrocities of the Seraglio were more than matched only the other day by those committed in the palace at Mandalay by the present King of Burmah, Thebaw. I have little to say for a personage who in the course of a single week shed the blood of nearly every relative, male or female, within his grasp; but undoubtedly, when there is no clear rule of royal succession, the choice may unhappily lie between one of these massacres and prolonged and desolating civil war. Fortunately a great deal of the progressive civilisation of the human race has consisted in the discovery of remedies against violence; and the evil of dynastic contests has been so manifest, and so little tolerable, that men seem very early to have striven to find contrivances for preventing them. Such contrivances were indeed not absolutely new; most of them were still more ancient tribal or family usages put to a new use.

One of the most ancient of them is to obtain the peaceful consent of the community to the succession of a particular chief either before the death of the last reigning sovereign or immediately afterwards. An elective monarchy, much modified in its later form, survived till the last century in Poland, and the most august throne in Europe, that of the Empire, of the Roman or German Empire, was till the beginning of the present century open in theory, as Mr. Freeman puts it, to every baptized Christian. There are in fact few monarchies in whose records some trace of an original popular election or confirmation cannot be found, and there is even a survival of it in the ceremonies of an English Coronation. A convenient modification of the system, which removes a dangerous interval between prince and prince, is to have the election during the lifetime of the reigning chief or king ; and thus, in Germany, a King of the Romans was generally chosen who was to become Emperor on the Emperor's death. A precaution of the same class, particularly where there is a numerous progeny of princes produced by polygamy, lies in the appointment of his successor by the reigning chief during his lifetime. This on the whole seems to be the system of succession prevailing in Afghanistan. Shere Ali owed his throne to it and so would Shere

Ali's heir-apparent, Abdulla Jan, if he had lived. But that it has to compete with other ideas about succession is plain from the bloody civil war which followed Shere Ali's accession and from the later quarrel on this very point between Yakub Khan and his father. The present Ameer, Abdurrhaman Khan, owes nothing to it. The weakness of the system lies in its tendency to produce the nomination of the child of some favourite wife, and thus to lead to endless palace-intrigues which sometimes bear fruit in civil war. Yet another contrivance, probably much older and in itself extremely rational, was once very widely diffused over the world, but has now only one field of operation among the European dynasties. This is the descent of the sovereignty to the oldest living male of the family. It still survives among the Turks. The present Sultan succeeded his brother, who had children; and Sultan Murad, who reigned for a few months, succeeded his uncle, though his uncle, Abdul Aziz, left male children. Where the system may be observed in its more barbarous form, we find it generally combined with that which I mentioned first, popular or tribal election. The Irish tribesmen and even the clansmen of the Scottish Highlands once elected their chiefs, but the former always chose the brother of the last chief, if of mature years, and the latter seem in very ancient times to have made similar elections. In warlike and perpetually disturbed societies there could be hardly a better principle to follow, for it has the great advantage of providing that the new chieftain shall be a grown and experienced man; and barbarism cannot afford to face the dangers of royal minorities. Its disadvantages do not begin till princes have begun to live in palaces amid luxury and ease. The heir-apparent then receives a training which more than compensates for his maturity of years. The seclusion in which he is kept, the jealousy with which all his energies are repressed by the reigning monarch, and his long familiarity with the harem, make it too probable that he will prove an incapable ruler if he is allowed to succeed. But the interests of the existing Chief, and still more of his children, are against the heir-apparent continuing to live. It is only in quite recent times that the next eldest male relative of a Turkish Sultan could be reasonably sure of the succession. The declaration that fratricide is a rule of the Ottoman State is attributed to Mahommed II., but the great example of the practice was set by Mahommed III., who massacred nineteen of his brothers and caused to be drowned twelve of his father's wives who were supposed to be pregnant.

The system which I have described, that under which *not* the eldest son *but* the eldest male kinsman succeeds, now bears very generally the name of Tanistry, from the Celtic word which points to its practice in ancient Ireland. Tanistry seems to be the undoubted parent of Primogeniture as we know it. But this later system of succession to thrones, though in some respects a great advance on Tanistry, was not at all free from dangerous uncertainties when it was first followed, and indeed some of these uncertainties linger about it still. It was through one of such uncertainties that the fortunes of this country came to be mixed up with a disputed succession, and that our ancestors were engaged in a foreign war which lasted a hundred years and which entailed a bloody civil war as its consequence. The Royal House or Sept, whose disputed headship involved England in these calamities, was that of the Capetians, of the collective body of the descendants of Hugh Capet, who in 987 got himself elected King of the Franks, or French, and founded the feudal monarchy of the country which, by successive additions, has since become so famous under the name of France. The progeny of Hugh Capet, continued exclusively through males, is not extinct at the present moment, after nine centuries ; but his male descendants, in the direct line of descent, came to an end in 1328. Philip the Fair, the man of strongest character in the whole line of French kings, with the possible exception of Henry IV. of France and Navarre, had died in 1314, leaving three sons who successively ascended the French throne under the names of Louis X., Philip V., and Charles IV. No one of these three kings left sons, but two of them left each a daughter, and one left three. Now Edward III. of England, who held the English Crown by an independent title, was a Capetian through his mother, Isabel, the 'she-wolf of France' of Gray's well-known Ode. Isabel was a daughter of Philip the Fair. On the death of Charles IV. of France, the youngest of the three royal brothers who died without male issue, our Edward III. put in a claim to the French Crown. It is usual both with French and with English historians to describe this claim as wholly untenable, but, though I will not here discuss what is really a point of technical law, I will pause to say that this view of the utter baselessness of Edward's title seems to me to be based partly on ignorance of certain peculiarities in ancient systems of law and partly on the assumption that certain legal rules, which were then unsettled, were as clearly recognised as they now are. There are some very ancient bodies of law which, though showing a decided preference for male inheritance, nevertheless permit the family to be continued through a daughter when the sons have failed. The ancient Hindu law required that in such a case the daughter should be[2] *appointed*, as the Sanscrit word is translated, to bear a son to her father. It is remarkable that this was the exact position of Edward III. He disclaimed the idea that France could be ruled by a woman, but he contended that, her brothers having died, she could transmit her father's right to her own male child. There are other apparent objections to Edward III.'s claim, arising from the fact that all the sons of Philip the Fair had left daughters, but it may be shown from the law-books of the time that, even in the inheritance of private property, the rules of succession which were to prevail under such circumstances were still uncertain.

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[2] See above, Chapter IV.

It is probable, then, that the argument of Edward III. was not considered in his day to be as untenable as all French and some English writers have represented it, but that it answered to some ideas about royal and other successions which were more or less current. But the point was no doubt regarded always as a doubtful one ; and in fact in 1316, on the death of the eldest son of Philip the Fair, Louis X., who left a daughter, an Assembly of Notables, which is sometimes described as the States-General of France, had resolved that the French Crown descended exclusively to males and through males. Thus the question of law was fully and fairly raised ; and it promptly fell under the only jurisdiction by which it could possibly be decided. It was put to the arbitrament of the sword. From the commencement of active hostilities by Edward III.

to the close of the English invasion of France undertaken by Henry V., the years of war between the English and French were as nearly as possible a hundred and twenty, interrupted only once by a regular peace, and always on the question of royal succession ; and this hundred years' war, as historians now call it, left undoubtedly as a legacy, as the result of the fierce military habits which it produced, the bloody struggle known as the Wars of the Roses, in which, to say the truth, the symbols of the two contending royal houses, the White Rose and the Red, were no more to the turbulent and warlike English nobility than the blue and green colours of the racecourse which once divided the populace of Constantinople, the New Rome, into fierce and seditious factions. The English kings bore the title of King of France, and carried the French lilies on their arms, down to the beginning of the present century. In the repeated negotiations between the British Government and the first French Republic, which at last bore fruit in the hollow and transient Peace of Amiens, the question of giving up this title and armorial bearings played a considerable part, as may be seen from the Papers of Lord Malmesbury.

With this famous dispute between the English and French kings—a dispute in which the English people from the first heartily took part, and in which the French people first imbibed the national spirit which has ever since characterised them—with this dispute there are considerations connected which seem to me sufficiently interesting to deserve to occupy the rest of this paper. Some of this interest is literary; some is archæological; but some is practical. We Englishmen are satisfied to rest the title of our Royal House on the Act of Settlement, which limits the right of succession to the descendants of the Electress Sophia of Hanover. But in other countries the old doubts which caused the war of a hundred years have still vitality enough to affect practical politics. As I before stated, the Capetian Sept or House, composed on the principle laid down by the States-General of 1316, of males who spring from males, still continues. It embraces the elder branch of French Bourbons, represented by the Count de Chambord, the younger branch consisting of the Princes of Orleans, the Spanish Bourbons, and the Italian Bourbons sprung from them. King Alfonso of Spain is the son of a Bourbon father and a Bourbon mother, but he is a king in right of his mother, and he was engaged a few years since in a civil war with his cousin, Don Carlos, whose pretensions to the throne are derived exclusively through males. The conflict of title between the Count de Chambord and the Orleans princes is of another kind and of a more modern type. All of them are full

Bourbons; but nevertheless the theory of sovereignty and government called Legitimism, which is still a factor in French and Spanish politics, is ultimately based on the assumption of a sort of sacred and indefeasible law regulating succession to the Crown, and placing it beyond competition and above popular sanction. There is no doubt that the belief in the existence of such a law first showed itself during the controversy between Edward III. and Philip of Valois.

This sacred and indefeasible law bears a familiar name. As it was at first conceived it was called the Salic law. It is not quite certain when men first began to suppose that the law thus designated applied to royal successions, but clearly this view prevailed both in England and France soon after the beginning of the hundred years' war. What were the ideas about the Salic law which were common in this country from one hundred to one hundred and fifty years after the conclusion of this quarrel may be gathered from Shakespeare's 'Henry V.,' act i. scene 2, where the English argument is put into the mouth of the Archbishop of Canterbury. It amounts to what lawyers call a plea in confession and avoidance. It admits the existence of a royal Salic law, but denies that it applied to the case of Edward III. and his rival. Now the Salic law, like the Capetian House, is still in existence, and we can put our finger on the very passage which was supposed to confer on Philip of Valois his title to the French throne. But both to the French argument and to the counter-argument which Shakespeare borrowed from the English chroniclers there is one fatal objection. The Salic law does not apply at all to thrones and to the succession to thrones. It merely regulates the succession to private property. When this most indisputable fact was first discovered in the sixteenth century by the rising learning of those times, there was a good deal of scandal in France and some little dismay. Montesquieu in the eighteenth century popularised the discovery; and Voltaire is never tired of jesting at the Salic law, which he had always supposed, he says, to have been dictated by an angel to Pharamond, the first Frankish king, and to have been written with a quill from the angelic wing. The Salic law might in fact be best described as a manual of law and legal procedure for the use of the free judges in the oldest and most nearly universal of the organised Teutonic Courts, the Court of the Hundred: it only mentions the king in so far as the king has authority in the Court. It was once supposed to contain a reference to some peculiar description of land called Salic land; but the new English edition[3] clearly shows that the word 'Salic' is an interpolation, and that nothing is referred to except the private inheritance of simple land.

It becomes therefore a matter of some interest to search out the true origin of this celebrated rule (erroneously supposed to be contained in the Salic law), which not only excluded females from succession to thrones, but denied the royal office to the nearest male kinsman if his connection with the royal house was through a female. It is first to be observed that, at the time of which we are speaking, the middle of the fourteenth century, there were two systems of royal succession in existence of much greater antiquity than either the Royal House of England or the Royal House of France. One of these was followed by semi-barbarous tribes at the very extremity of Europe, but it is of immemorial age, and, as some think, almost as old as mankind itself. I have already called it Tanistry, the system under which the grown men of the tribe elect their own chief, generally choosing a successor before the ruling chief dies, and almost invariably electing his brother or nearest mature male relative. In the fourteenth century this system was confined to the so-called kings or chiefs of that part of Ireland which lay beyond the English Pale, but there is a far-off echo of the same system in the story which furnished a plot to the tragedy of 'Hamlet,' where the murdered king is succeeded not by his son, but by his brother, who strengthens his title (according to a usage also of the highest antiquity) by marrying the widow of his predecessor. The very memory of

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[3] See below, Chapter VI. p. 169.

Tanistry would probably have died out of Europe if, a century later, this method of succession had not become that of a throne once the most exalted in Europe through the capture of Constantinople by the Ottoman Turks. The Sultanate in their hands followed this rule of descent, brother succeeding brother, but all trace of election by the people, if it ever existed, was lost. As followed by the Turks, the system of course excludes females, but it would probably have excluded them at all times, as its main object is to secure a military leader in the maturity of life.

The other system of regal succession to which I referred was that to the throne and crown of the Roman Empire, which still theoretically survived in Germany and Italy. This too was a system of election, but the right to have a voice in the choice of the Emperor had gradually become limited to a certain number of prelates and of princes once great officers of the Imperial Court. From one of these, whom we know as the Elector of Hanover, our own royal family is descended. The parentage of the elective Roman Empire may be traced to the acclaim of the Roman soldiery saluting a successful general as 'Imperator;' but since the fall of the Roman Republic, the Imperial dignity had a tendency to concentrate itself in particular families, a settled succession being procured by the practice of choosing the new Cæsar during the reigning Emperor's life. In the more modern or Romano-German Empire, a successor might be elected, before the death of the reigning Emperor, under the name of the King of the Romans; and the same result followed in the practical limitation of the Imperial dignity to particular families, of whom the House of Austria was the last. The German Empire, considered as the direct successor of the Roman Empire, fell in 1806; but in our own day it has been revived without a revival of election and as a dignity hereditary in the Prussian Royal House.

When, then, France and England entered into their bloody war of a hundred years, which was to decide the place of women in royal successions, there were two systems of succession in Europe which would have undoubtedly excluded women from the throne. One would have shut them out from the most august dignity in the West, because it had been originally an honour conferred on a triumphant soldier. The other would have denied to them a petty Irish chieftainship, because the chief was intended to be a fighting man all his life. But in the monarchies which lay between these extremes, monarchies of the class which we call feudal, there was no settled rule excluding women, and still less their male children. See what had occurred in England as long as nearly two centuries before Edward III.'s time. The country had been desolated by the war between the Empress Matilda and Stephen of Blois, afterwards King Stephen of England. But Stephen's claim to the throne was derived not from his father, but from his mother; and Matilda, herself a woman, and but faintly objected to by the English barons on that account, transmitted an unquestioned title to her son Henry II. How, then, came such a difference to arise between countries so alike as France and England then were—between monarchies not then divided by a silver streak of sea, since the English kings had ever since the Conquest ruled over more or less of France, sometimes over its most flourishing provinces, as vassals of the French king more powerful than their suzerain?

I will indicate as briefly as I can the chief conclusions to which a long, intricate, and difficult inquiry would lead us. All the Western European monarchies, lying between the Roman Empire and the tribal chieftainships of the Irish and of the Scottish Highlanders, were (to use a word which imperfectly expresses their characteristics) feudal. Now among the many things which may be said about the system known to us as Feudalism, one of the least doubtful is that it mixed up or confounded property and sovereignty. Every Lord of the Manor or Seigneur was in some sense a King. Every King was an exalted Lord of the Manor. This mixture of notions which we now separate had been unknown to the Romans of the Empire, and had somehow been introduced into the Western world by the barbarous conquerors of the Roman Imperial territories. If then we avert our eyes from the ideas about chiefship and kingship entertained by barbarous races—ideas generally associated with some form of the system which I have called Tanistry—and if we look to their ideas concerning the inheritance of property, we find the same uncertainty and difference of view about the right of women to succeed to it which we observe in the feudal monarchies. Here no doubt we come upon a set of phenomena of which the precise significance is much disputed in our day; but probably there would be general agreement in the statement which follows. The greatest races of mankind, when they first appear to us, show themselves at or near a stage of development in which relationship or kinship is reckoned exclusively through males. They are in this stage; or they are tending to reach it; or they are retreating from it. Many of them in certain contingencies, generally rare or remote, give women and the descendants of women a place in succession, and the question with modern inquirers is whether the place thus assigned to them is the survival of an older barbarism, now exemplified in savage races, which traced kinship exclusively through females, or whether it results from the dissolution, under various influences, of 'agnatic' relationship, that is, of relationship through males only.[4] The position of women in these barbarous systems of inheritance varies very greatly. Sometimes they inherit, either as individuals or in classes, only when males of the same generation have failed. Sometimes they do not inherit, but transmit a right of inheritance to their male issue. Sometimes they succeed to one kind of property, for the most part movable property, which they probably took a great share in producing by their household labour; for example, in the real Salic law (not in the imaginary Code) there is a set of rules of succession which, in my opinion, clearly admit women and their descendants to a share in the inheritance of movable property, but confine land exclusively to males and the descendants of males. Indeed, it is not to be supposed that under a purely 'agnatic' system of relationship governing inheritance, women are wholly unprovided for. The idea is that the proper mode of providing for a woman is by giving her a marriage-portion; but when she is once married into a separate community consisting of strangers in blood, neither she nor her children are deemed to have any further claim on the parent group.

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[4] I have endeavoured to state the alternative theories as I suppose they would have presented themselves to the mind of Mr. J. F. McLennan, prematurely lost to this branch of inquiry, who has forced all interested in them to revise or review their opinions.

There is therefore a strong probability that, among the miscellaneous mass of barbarians of Aryan breed who overran Western and Southern Europe, all sorts of ideas prevailed about succession to property. Some would exclude the descendants of women altogether. Others would admit them in certain contingencies. I regard therefore these disputes about the right of succession to feudal monarchies as having their origin in differences of opinion about the inheritance of property, but as transferred by the feudal spirit to the descent of crowns.[5] They are a late survival of very ancient differences of usage between barbarous communities, now mixed together as conquerors of the West. The claim of Edward III. to the French throne would have received favourable consideration as a claim to property by those most ancient Brahman lawyers who framed the Hindu law-books erroneously called by Western scholars Codes.

It will therefore be perceived that the question, as it presents itself to my mind, is not, why did

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[5] The most general feudal rule about succession to fiefs is that contained in the Customs of Normandy; but the compiler, as is usual with such writers, gives merely feudal reasons for it. Thus, after stating that the rule forbidding one uterine brother to succeed to another (*cum a parentibus suis non descendit*) is subject to exception in the case of a fief descending from the mother, he goes on to say '*procreati autem ex feminarum lineâ, vel feminæ successionem non retinent dum aliquis remanserit de genere masculorum.*'

Edward III. of England, the son of a Capetian Princess, become a pretender to the throne of France on the death of his three uncles without male issue, but rather, why were the ruling classes of the provinces then composing France so obstinately persuaded that nobody but a man descended through men from the founder of the Royal House could rightfully reign over them? I think there is an explanation of this strong conviction for which the Frenchmen of that day fought so stoutly. It is this. There are some peculiarities in the Royal House founded by Hugh Capet which, if not unique, are of extreme rarity. The Sept, or, as it is called in India, the Joint-Family, consisting of the male stock of the founder, of male descendants tracing their descent entirely through males, still exists, although not much less than 900 years have elapsed since Hugh Capet died, and moreover it shows no signs of dying out. Several times in the course of this long history it has seemed on the point of extinction. Twice has the reigning branch ended in three kings who had no male children. The direct descendants of Hugh Capet ended, as you have heard, in 1328. Then the Valois succeeded, and they too came to an end in three brothers who had no legitimate children, male or female, Francis II., Charles IX., and Henry III. But the fertility of some younger branch has always remedied the decay of the elder, and on the death of Henry III., Henry of Navarre took his place, just as a Valois had taken the place of the lineal heir of Hugh Capet. The same rule of the infecundity of the elder line being repaired by the fecundity of the younger, seems still to hold good. Of the Bourbons who are descended from Henry of Navarre, the branch of Condé was exhausted almost in our own day. The eldest branch of the same house seems likely to close with the childless Prince known as the Count de Chambord, and the elder branch of the Spanish House has only been continued through women. But the younger lines of all the Bourbon Houses are still prolific, represented by the French Princes of Orleans, by the Italian Bourbon Princes, and by the Spanish Princes descended from the first Don Carlos. All these Princes are the male issue, descended exclusively through males, of Hugh Capet, who, as I said, died nearly 900 years ago.

These facts are possibly not unexampled, but they are very unusual and extremely remarkable. Their rarity may be concealed from us by our English way of talking loosely about families who came in with the Conqueror, and through our English usage of tracing descent indiscriminately through males and females. No doubt there are longer genealogies which are matter of belief. The most illustrious of all, that of the House of David, is longer, but then the Kings of Judah were polygamous, and polygamy, though it sometimes produces sterility, occasionally results in families like that of the Shah of Persia, who not many years ago left eighty sons. In India there are pedigrees greatly longer, for there are princes claiming to descend from the Sun and the Moon. But I need scarcely say that the earlier names in these genealogical trees are those of fabulous personages, and indeed under a system of succession which, like most of the Indian systems, permits the adoption of children, there can be but little assurance of the absolute purity of male descent. It must at the same time be understood that I am not asserting the impossibility of pedigrees of this length, but only their rarity. It is said that genuine pedigrees almost as long may be found among the English gentry, but anybody can convince himself that among the English nobility a long continuity of male descents is very rare, though there are exceptions, a notable one being that of the Stanleys.

But, rare and striking as is this peculiarity in the family history of the Capetians, that House presented in the fourteenth century a phenomenon which is still rarer and still more impressive. The kings sprung from Hugh Capet succeeded one another, son to father or brother to brother, for more than 300 years. Through all this time there was no occasion to call in a remote collateral, an uncle or great-uncle or a cousin. How unusual is such a succession we can conceive ourselves by taking a very simple test.

Let us take any half-dozen conspicuous men of a hundred years since, conspicuous in any way we please, statesmen or writers or simply of noble birth, and we shall find that their living descendants through males are few, though their descendants through women may be numerous. Go *two* hundred years back and you will see that the fewness of male descendants through males from men of eminence much increases, and if you go *three* hundred years back, it becomes [6] extraordinary. The whole subject belongs to a branch of the theory (as it is called) of Heredity which has not been perfectly investigated as yet, and which it would be out of place to discuss here. I think, however, that it is not too bold a proposition that the greater the eminence of the founder of a non-polygamous family, the greater on the whole is the tendency of the family to continue itself (if it continue at all) through women in the direct line; and that the best securities for a pure pedigree through males are comparative obscurity and (I could almost say) comparative poverty, if not extreme. The rule is of course only approximate, and the example of the Capetian dynasty sufficiently shows that there are exceptions to it. At the same time, the position of the early Capetians must not be judged by the splendour of the late Kings of France. They were comparatively poor and comparatively obscure, and for long could hardly make head against even the humbler of their nominal vassals.

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[6] The subject, as respects the pedigrees of the nobility, is discussed by Mr. Hayward in a very interesting paper in his *Biographical and Critical Essays*, Third Series, 'English, Scotch, Irish, and Continental Nobility.' See page 260. 'It is quite startling on going over the beadroll of English worthies, to find how few are directly represented in the male line.'

This, then, I believe to be the true secret of the so-called Salic rule of succession. There is nothing, even now, very uncommon in the frame of mind which leads men to think that everything, of which they know or remember nothing to the contrary, has existed from all time and that it ought to continue for ever. But in an age in which historical knowledge was all but non-existent, and in which the mass of mankind lived by usage, such a habit of thought must have been incomparably stronger; and we cannot doubt that men's minds were powerfully affected by this uninterrupted continuation of male descents in the royal family of France, which even to us is impressive. Nobody, they would say, has reigned in France but a King the son of a King. There had been no occasion to call to the throne a collateral relative, much less a kinsman through women. Amid a general flux of men's ideas on the subject of succession to thrones, the French law would at all events have appeared to have solidified. And, such being the preconceived notions of Frenchmen, there is no doubt that they were strengthened by the provision of the real Salic law, which said that land—or, as it was once read, Salic land—should descend exclusively to males through males. This legal provision was in fact irrelevant to the question, but it may very easily have been misunderstood; and it is a significant circumstance that manuscripts of the true Salic Code, the Lex Salica of the Germans, appear to have been found in the Royal Library at Paris from the time of its first foundation.

The supposed Salic rule, excluding women and their descendants from royal successions, has been adopted in later days in many countries in which women were at one time permitted to succeed. In constitutionally governed States, female successions have always been popular; and quite recently, in Spain and Portugal, the establishment of constitutional government coincided with the overthrow of the rule which excluded queens from the throne. The Spanish monarchy was composed of portions in most of which the throne might be filled by a woman, but when the younger branch of the Bourbons obtained the Crown of Spain, they introduced the so-called Salic rule. This system of succession is manifestly thought to be convenient wherever, whether there be a Constitution or not, a large measure of authority resides with the sovereign. Thus the succession to the German Empire, following that of the Prussian kingdom, is now Salic; and in

Russia, where an extremely peculiar rule of succession prevailed, one of the most usual successions being that of the widow of the late Emperor, the exclusive devolution of the Crown through males on males was for the first time introduced by the Emperor Paul I.

The explanation given by French historians of the memorable rule which first sprang up in their country has nothing to do with reasons of convenience. They say that the exclusion of women and their issue was the fruit of the intense national spirit of Frenchmen. If it had not been for this principle the King of France might have been an Englishman, or a German, or a Spaniard, according to the nationality of his mother's husband ; and this was contrary to the genius of France, which imperatively required that the King should be a Frenchman. But this is the error, not so very uncommon in the philosophy of history, of taking the consequence for the cause. It was not the national spirit of Frenchmen which created the Salic rule, but the Salic rule had a great share in creating the French national spirit. No country grew together originally so much through chance and good luck as France. Originally confined to a small territory round Paris, province after province became incorporated with it through feudal forfeitures, through royal marriages, or through the failure of lines of vassals even more powerful than the King to whom they owed allegiance. But owing to the Salic rule, the King always belonged to the heart and core of the monarchy. The King of England who first annexed Ireland was a Frenchman. The King of England who united Scotland with her was a Scotchman. But the King of France was from first to last born and educated a Frenchman. The same vein of character may be seen running through the whole series of French Kings, broken only perhaps in the unhappy Prince who closed the dynasty in the last century. Hence the whole authority of the French Kings was exerted to bring each successive acquisition of the Crown into political and social conformity with the original kernel of the kingdom. And in this way was created the French love of unity, the French taste for centralisation, the French national spirit. The undoubted power which France possesses of absorbing into herself and imbuing with her national character all the populations united with her has been attributed to the French Revolution; in reality it is much older, and may be traced in great part to the Salic rule of royal succession.

CHAPTER VI.

THE KING, IN HIS RELATION TO EARLY CIVIL JUSTICE.

WHENEVER in the records of very ancient societies, belonging to races with which we have some affinity, we come upon a personage resembling him whom we call the King, he is almost always associated with the administration of justice. The King is often much more than a judge. He is all but invariably a general or military chief. He is constantly a priest and chief priest. But, whatever else he may be, he seldom fails to be a judge, though his relation to justice may not be exactly that with which we are familiar.

The examples of this association which I will give must be few among many. The monuments of jurisprudence which lay claim to the highest antiquity are those of the Hindus, one of which has long been vaguely known to Europeans under the name of the Code of Manu. Many similar collections of ancient Indian legal rules have of late been discovered, and some have been translated, but it is to be observed they none of them deserve to be called Codes. They are in fact books of mixed law and theology, the manuals in use with the Indian Brahmans in ancient law-schools, in which their subjects were no doubt at first taught orally and committed to memory, and were only embodied in writing in comparatively recent times. They are further, as we have them, the result of a sort of literary evolution. The original treatises, or rather bodies of learning, dealt with all things divine and human (regarded no doubt from a purely theological point of view), but the various portions of this learning became gradually specialised, till at last treatises dealing with law mainly, or law entangled with religious ritual, were finally separated from the rest. In these ancient law-books, in so far as they are law-books, the authority of a King is assumed. He sits on the throne of justice. He has the book of the law before him. He has learned Brahmans for assessors. Some part of these ideas, like much else of immemorial antiquity, survive in India. A gentleman in a high official position in India has a native friend who has devoted his life to preparing a new book of Manu. He does not, however, expect or care that it should be put in force by any agency so ignoble as a British Indian legislature, deriving its powers from an Act of Parliament not a century old. He waits till there arises a King in India who will serve God and take the law from the new Manu when he sits in his court of justice.

If we pass from the extreme East to the extreme West, from the easterly to the westerly wing of the Indo-European or Aryan race, from India to Ireland, we find this same association. That most interesting system, the ancient Irish law, is known as the Brehon Law, because it is said to have been declared by the Brehons, who are in fact as nearly as possible the Brahmans of India, with many of their characteristics altered, and indeed their whole sacerdotal authority abstracted, by the influence of Christianity. Here, too, we find that the great Brehons are Kings or King's sons ; and we come upon the significant proposition that, though a King is necessarily a judge, it is lawful for him to have a professional lawyer for an assessor. There are many most striking resemblances, often on the most unexpected points, between ancient Indian and ancient Irish law ; and this hint as to the proper constitution of a Court of Justice is one of them.

The ancient Hindu lawyers claimed a descent from supernatural personages only second to the gods. The ancient Irish lawyers pretended that the first of their order was a pupil of Moses in the Desert. But, in point of fact, the order of ideas exhibited by both systems is relatively more modern than that which we can trace in the poems attributed to Homer

Here we can perceive the undeveloped form of the Indian and Irish conception of a Court. The Homeric King is chiefly busy with fighting. But he is also a judge, and it is to be observed that he has no assessors. His sentences come directly into his mind by divine dictation from on high. These sentences, or θέμιστες—which is the same word with our Teutonic word 'dooms'—are doubtless drawn from pre-existing custom or usage, but the notion is that they are conceived by the King spontaneously or through divine prompting. It is plainly a later development of the same view when the prompting comes from a learned lawyer, or from an authoritative law-book.

I pause on one more instance of the association familiar to all of us. The Judges of the Hebrews represent an old form of kingship. The exploits told of them in the Scriptural Book of Judges point to them chiefly as heroes raised up at moments of national disaster; but, independently of the etymology of the name by which they are designated, they were clearly exponents of law and administrators of justice. Deborah, the prophetess, who is counted among them, judged Israel. She dwelt under the palm-tree of Deborah in Mount Ephraim, and all Israel came up to her for judgment. Eli, the last but one of the Judges, had judged Israel forty years, and Samuel the prophet, the last of them, expressly claims credit in his old age for the purity of his judgments. On the other hand, the decline of the system is shown by the fact that the sons of Eli are expressly charged with abuse of authority, and those of Samuel with corruption. In the more mature kingship which presently succeeded, the military functions of the King are most prominent in Saul and David, but the judicial authority again manifests itself in Solomon.

There is one portion of these ancient ideas about justice on which it is necessary to dwell for a moment on account of the great importance which they prove to have had for mankind. It would seem that, in these early times, however much the administration of justice might be organised, even though a system of law-courts might exist competing with the King's justice and quite independent of him, even though all or some part of the law might have been set forth in writing, yet there was always supposed to be what may be called a supplementary or residuary jurisdiction in the King. The law, however administered, was never believed to be so perfect but that the royal authority was always required to eke out and correct it. Just as, according to the most modern ideas about jurisprudence, every body of law is thought certain to become an instrument of gross tyranny unless there is somewhere a legislature to amend it, so even that servility to immemorial usage which is characteristic of very ancient times did not exclude the correction of usage by the authority of the King. We owe to this belief in a supplementary judicial authority residing in the King some branches of our own jurisprudence which are in great credit, *e.g.* the so-called Equity of our Court of Chancery; and others of much less repute may be traced to it, such as the old Court of Star Chamber,[1] which was established by a belated and therefore unpopular exercise of this same residuary royal power. But a large part of mankind is indebted for much more than this to these ancient notions. Practically at this moment two systems of law divide between them the whole civilised world. One is the English law, followed by nearly all the English-speaking peoples—by ourselves, by all the colonies actually planted by Englishmen, by all the Northern and Central States of the American Union, and to a greater extent every day by the millions of India. The other is the Roman law, whether it take the form, as in Germany, of what we call a common law, or whether it appears under a slight disguise in the French Civil Code, and the numerous codes descended from it. But the real indigenous law of ancient Rome deserved no such fortune as this. It was a stiff system of technical and ceremonious law, belonging to a common and easily recognisable type. But it underwent a transformation through this very residuary or supplementary royal authority of which I have been speaking. The judicial powers of those dimly seen and half fabulous personages, the Kings of Rome, descended, at the establishment of the Roman Republic, to the magistrate known as the Prætor; and the old belief in a divine or semi-divine inspiration, dictating judicial rulings to the ancient King, gradually converted itself into the assumption, first of a religious and then of a philosophical theory, guiding the more modern Prætor. Auguste Comte might have appealed to the change as illustrating the transformation of a theological into a metaphysical conception. What has descended to so large a part of the modern world is not the coarse Roman law, but the Roman law distilled through the jurisdiction of the Prætor, and by him gradually bent into supposed accordance with the law of Nature. The origin, therefore, of a body of law, regarded by some of the most civilised societies of mankind as the perfection of reason, and spoken of by continental lawyers with what Englishmen at all events regard as extravagance of praise, is to be sought in this most ancient belief that law, custom, and judicature were all necessarily and naturally subject to correction by the supreme authority of the King.

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[1] There is no doubt that the Court of Star Chamber was of higher antiquity than the statutes regulating it, 3 Henry VII. c. 1, and 21 Henry VIII. c. 20.

I wish, however, to speak less of early Kings in general than of the early Teutonic or Germanic King and of his relation to civil justice. Our own Queen Victoria has in her veins the blood of Cerdic of Wessex, the fierce Teutonic chief out of whose dignity English kingship grew; and in one sense she is the most perfect representative of Teutonic royalty, as the English institutions have never been so much broken as the institutions of other Germanic societies by the overwhelming disturbance caused elsewhere by Roman law and Roman legal ideas.

But, though this is true, there is no community of which the early legal history is more obscure than ours, much as English and German learning has lately done for it. Fortunately, for an account of the early relations of the Germanic King to justice, we can turn to a monument of ancient Teutonic law constructed at a time when piratical chiefs from Jutland and Friesland were beginning to work the overthrow of the Roman provincial administration in our island. This is the Salic Law, the oldest of the Teutonic codes, the oldest portrait of Germanic institutions drawn by a German. Scholars are now pretty much agreed that it belongs to the fifth century after Christ, and that its preparation was prompted by the great codification of Roman law effected by the Emperor Theodosius II. Nothing is more singular than the delusion, so long and so obstinately entertained in Europe, that the Salic Law either was a system of rules, or at any rate comprised a set of rules, regulating the succession to thrones and crowns. In reality it deals with much humbler matters. It is concerned with the daily life of the men who belonged to the confederation of German tribes called (it is not altogether known why) the Salian Franks. It deals with thefts and assaults, with cattle, with swine, and with bees, and above all with the solemn and intricate procedure which every man must follow who would punish a wrong or enforce a right. It might be best described as a manual of law and legal procedure for the use or guidance of the free judges in that ancient Teutonic Court, the Court of the Hundred. It is written in phraseology which probably reflects accurately the way in which the Germans of the fifth century spoke Latin. Some of the manuscripts of it contain interlineations in a very old Teutonic dialect which, under the name of the Malberg Gloss, still excite the strongest interest among philologists. With Kings it has nothing whatever to do, except so far as the King is concerned with the administration of justice. The famous passage which was once thought to justify bloody European wars, which caused the war of a hundred years between England and France, and which is still the basis of the theory of politics called

Legitimism, merely gives the rule of inheritance to landed property.[2]

This Court of the Hundred, which administered the Salic law to the Salian Franks, was the most ancient of the organised Courts among the Germanic races. There were probably 'natural' prehistoric Courts which were older, such as the assemblies (or moots) of the various village communities, but the Hundred Court was the result of a deliberate attempt to furnish an alternative to violence and bloodshed, and it seems to have been practically universal among the Germanic tribes. It has bequeathed to this country a territorial description, the Hundred, or (as it is called in the north) the Wapentake ; and Mr. Gomme, in his interesting volume on 'Primitive Folk Moots,' has traced many of the sites at which its open-air meetings were held. They seem to be particularly abundant in Norfolk and in the east of England. The Hundred Court, however, was not an institution which had great vitality in our country, since part of its powers seems at an early date to have gone over to the larger judicial body called the County or Shire Court, while another part went back again to the village communities under their newer name of Manors.

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[2] *De terrâ (Salicâ) in mulierem nulla portio hæreditatis transit,'* &c. The word 'Salicâ' is certainly an interpolation, as may be seen at a glance from the tabular comparison of the MSS. in the splendid edition of the *Lex Salica* by Messrs. Kern and Hessels. (London: Murray, 1880), L.S. 379 *et seq.*

As the Hundred Court appears in the Salic Law, it looks at first sight like an entirely popular tribunal with which royal authority has nothing to do. The judges are all the freemen living within the limits of the Hundred. The President is elective and bears the name of the Thunginus or Thingman. I will say no more of its general characteristics than that it is intensely technical, and that it supplies in itself sufficient proof that legal technicality is a disease not of the old age, but of the infancy of societies. But it has one remarkable peculiarity, that in a large class of cases which come before it, those based on contract or ownership, it does not enforce its own decisions. It may be suspected that, at a still earlier date, this singular inability to discharge what seems to us the most distinctive function of a judicial tribunal extended to all the decrees of the Hundred Court, whatever might be their object. The explanation seems to be that the most ancient Courts deliberately established by mankind were intended to be what we should call Courts of Arbitration. Their great function was to give hot blood time to cool, to prevent men from redressing their own wrongs, and to take into their own hands and regulate the method of redress. The earliest penalty for disobedience to the Court was probably outlawry. The man who would not abide by its sentence went out of the law. If he were killed, his kinsmen were forbidden, or were deterred by all the force of primitive opinion, from taking that vengeance which otherwise would have been their duty and their right.

But at this very point the Salic Law puts us on the trace of one of the greatest services which royal authority has rendered to civil justice. At the first glance, the King appears to have nothing to do with the Court of the Hundred. He is merely represented in it by a class of officers who collect his share of the fines imposed—a very important part of the royal revenues. We find, however, that if the unsuccessful litigant in the Court had agreed to abide by the sentence, the King's officer would enforce it; and even in the absence of such an agreement, if the litigant who had been successful went to the King in person and petitioned him, the King would do him justice in virtue of his ultimate residuary authority. These are the first feeble and uncertain steps of royal authority towards the ascendency which in all Teutonic countries it has gained over the primitive popular justice. It has dwarfed and finally absorbed this justice, but then it has conferred on it the faculty without which we can scarcely conceive it existing. The King has nerved its arm to strike, and there seems no doubt that the process by which the whole force of the State is employed to enforce the commands of the judge is the result of the contact, ever growing in closeness, between the royal authority and the popular court. We possess in the Capitularies of the Frankish Kings some evidence of the further course of these relations between the King and the Court. After a while, the popular president of the Hundred Court, the Thingman, disappears, and his place is taken by the Graf or Count, the deputy of the King. Royal authority is therefore constantly growing, and, as a consequence, we find that the Count will use the King's power to enforce all decrees of the tribunal, without reference to their nature, without previous agreement, and without appeal to the King's supreme equity. The presidency of the royal officer over the Court was the beginning of a separate set of changes by which the character of the old popular justice was profoundly changed. Everywhere in the Teutonic countries we find deputies of the King exercising authority in the ancient courts, insisting that justice be administered in the King's name, and finally administering a simpler justice of their own amid the ruins of the ancient judicial structures fallen everywhere into disrepute and decay. Such being the well-established consequences of the contact between the Teutonic King and the Teutonic Popular Courts, it seems worth while inquiring what were the weaknesses of those Courts, what seeds of dissolution they contained, and what there was in the King, even apart from this power, which made him their natural successor.

Two forms of authority, the King and the Popular Assembly, are found side by side in a great number of the societies of mankind when they first show themselves on the threshold of civilisation. The Popular Assembly and the Popular Court of Justice are in principle the same institution; they are gatherings of the freemen of the community for different public purposes. The King as *political* chief is contrasted with the Popular Assembly; as *military* leader he is contrasted with the *host*, with the general body of fighting men; with the Popular Court of Justice he is contrasted as *judge*, as depositary of the special judicial authority which is my subject. I do not enter upon questions, now much disputed, whether the King or the Popular Assembly is the older of the two, or whether they have co-existed from all time, and I will merely observe that the tendency of recent research is to assign the higher antiquity to the assembly of tribesmen. Taking it, however, as a fact that the two authorities very generally appear together, we may remark a further law of progress which they seem to follow. In such communities as those of which Athens and Rome are the great examples—in that walled city which was the cradle of a large part of modern ideas—the organs of freedom, as we should say, continually increase in importance. The assemblies monopolise power. The King either disappears or becomes a mere shadow. But in communities spread over large spaces of land, and without walled towns, it is the King who grows, and all popular institutions tend to fall into decrepitude. Are there, then, any reasons for this growth and decay, so far as regards the particular institutions with which we are concerned —judicial institutions? One source of weakness may, I think, be traced in the ancient popular institutions, both judicial and political. This was the great number of men, and the large portion of every man's time, which they required for their efficient working. Even in communities confined by the surrounding wall to moderate dimensions, we can see the difficulty of bringing up the people to the discharge of their public duties. Scholars will remember the vermilion-stained rope which was dragged along the streets of Athens to force the citizens to the place of assembly, and which exposed the laggard marked by it to a fine; and their recollection will also dwell on the famous fee, the three obols, which was paid for attendance there and at the popular tribunal. Mr. Freeman, speaking of the later revival of Hellenic freedom in the collection of States united by the Achæan League ('History of Federal Government,' i. 266), has noticed the effect which the burden of attendance on political duties had in throwing political privilege into a few hands and thus in converting democracies into aristocracies. Much of ancient freedom was, in fact, lost through the vastness of the payment in person which it demanded. In communities of the other class, those spread in villages over a great extent of country, the burdensomeness of public duties must always have been considerable, and must have become very great when their size increased through the absorption of many tribes in the same nation. Some evidence of this may be discerned in the importance which old Germanic law assigns to the *sunis* or *essoin*, a word which once puzzled English lawyers greatly, but which is of old German origin, and really signifies the ground of legal excuse which a man may make for failing to discharge any duty in a popular Teutonic tribunal. But the difficulty is easily understood in another way. Although its pedigree is much interrupted, our English jury is a survival of the old popular justice; yet nobody even now, I suppose, receives a summons to attend a jury with perfect complacency. What, however, must the necessity for attendance have been when the place of meeting was at the other side of the hundred, or perhaps of the county, when there were no roads in England except the Roman roads, when the eastern counties were little better than a fen, and when the

Wealden of the south were really forests? Yet there is some ground for thinking that the burden of attendance was lighter in England than elsewhere. On the Continent of Europe, so long as the Hundred Court had a genuine existence, and up to the time when it was converted into a limited Committee of Experts, we cannot trace any relaxation of the severe rule that every man of full age and free must be present. But, even in this particular, the beginnings of that representative system which has done so much to continue the English form of Teutonic liberty in life can be perceived specially characterising this country. From very early times the English Hundred and Shire Courts were attended not by every freeman, but by the Lords of Manors, and by the Reeve and four men representing each village or parish. Nevertheless there can be little doubt that even in England the duty of attendance was felt to be very burdensome. In the Confirmation of Magna Charta by Henry III. in 1217, there is a provision that the County Court shall not meet more than once a month; and Mr. Stubbs (' Const. Hist.' i. 605) suggests the explanation that the sheriffs had abused their power of summoning special meetings of the court and fining absentees. He adds that it was the direct interest of the sheriffs to multiply the occasions of summons.

This multitudinousness, if I may so describe it, of all Courts of Justice except those of the King, lasted far down into the feudal period. Feudalism attained its greatest completeness in France, and French historians are astonished at the number of persons who were required for the organisation of a feudal Court of Justice. The principle is expressed in a phrase familiar to us, that every man must be tried by his peers, which originally meant that his judges were the entire body of persons standing in the same degree of relation with himself to some superior above. If a great vassal of the Crown had to be tried for treason or felony, all the great vassals of the French Kings must assemble from all parts of the territories of which the French King was the overlord; and it was precisely such a Court which deprived our King John of the fairest provinces of France. If, on the other hand, a villein had to be tried, his peers were the villeins of the same seigneurie. The inevitable result was that the French feudal Courts dwindled into bodies which confided all active duties to a small committee of experts, and as these experts were for the most part devotees of the Roman law, they exercised memorable influence in diffusing notions of the absolute power of the King, and specially of his rightful authority over justice. *Quod principi placuit, legis habet vigorem*—this was the central principle of the developed Roman jurisprudence.

It may thus be believed that the ancient Germanic

Popular Courts, and probably the Popular Courts of many other societies, fell into disfavour or decay, as communities of men grew larger by tribal intermixture, through the multitude of judges they included, and through the great difficulty of discharging judicial functions. The freeman who ought to have attended preferred to stay at home, sending his excuse or *essoin* for the neglect, and submitting to a fine if it were insufficient. The tribunals were thus ever changing into committees of legal experts, with a strong bias towards royal authority. Meantime we know from other evidence that the King and the King's justice were ever growing at their expense; and we may ask ourselves whether there was anything in the royal office and functions which gave them an advantage in this competition with the Popular Local Courts. The story of the struggle is far too long and intricate to be told here; but the habits of the King gave him one advantage which there is some interest in pointing out, all the more because it is often overlooked. I do not suppose that, when a litigant put himself from the first into the King's hands, or appealed to the King over the head of the popular tribunal, he went to some royal residence, palace, or castle. This would have been an aggravation of the difficulties of the popular local justice. It was not the litigant who went to the King, but the King who came to the litigant. I believe upon a good deal of evidence[3] that these ancient kings were itinerant, travelling or ambulatory personages. When they became stationary, they generally perished. The primitive Kings of communities confined within walls, like the old Athenian and the old Roman Kings, soon dropped out of sight. Perhaps, as Mr. Grote has suggested, they lived too much in full view of their subjects for their humble state to command much respect when the belief in their sacredness had been lost. But the more barbarous King of communities spread over a wide territory was constantly moving about it; or, if he did not, he too perished, as the Kings called the *rois fainéants* of the Franks. If I were called upon to furnish the oldest evidence of these habits of the ancient King, I should refer to those Irish records of which the value is only beginning to be discerned, for, whatever may be said by the theorists who explain all national characteristics by something in the race or the blood, the most ancient Irish laws and institutions are nothing more than the most ancient Germanic laws and institutions at an earlier stage of barbarism. Now, when Englishmen like Edmund Spenser first began to put their observations of Ireland into writing at the end of the sixteenth century, there was one Irish practice of which they spoke with the keenest indignation. This was what they called the 'cuttings' and 'cosherings' of the Irish chiefs, that is, their periodical circuits among their tenantry for the purpose of feasting with their company at the tenants' expense. It was, in fact, only a late survival of common incidents in the daily life of the barbarous Chief or King, who had no tax-gatherers to collect his dues, but went himself to exact them, living as a matter of right while he moved at the cost of his subjects. The theory of the Irish law was, though it is impossible to say how far it corresponded with the facts, that the Chief had earned this right by stocking the clansman's land with cattle or sheep. We find a highly glorified account of the same practice in ancient records of the life and state of those Irish Chiefs who called themselves Kings. 'The King of Munster,' says the 'Book of Rights,' 'attended by the chief princes of his kingdom, began his visits to the King of Connaught, and presented to him 100 steeds, 100 suits of military array, 100 swords, and 100 cups; in return for which the said King was to entertain him for two months at his palace at Anachan, and then to escort him to the territories of Tyrconnell. He presented to the King of Tyrconnell

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[3] See Grimm, *Deutsche Rechtsalterthümer* I. 237. 'Erstes Geschäft des neuen Königs war sein Reich zu umreiten.' . . Grimm quotes Gregory of Tours, 4, 14, 'Deinde ibat rex per civitates in circuitu positas.' He refers also to similar duties of the Swedish King, and cites the prayer of the Saxons to Henry IV.: 'Ut totam in solâ Saxoniâ ætatem inerti otio deditus non transigat, sed interdum regnum suum circumeat.'

20 steeds, 20 complete armours, and 20 cloaks, for which the said King supported him and the nobility of Munster for one month, and afterwards escorted him to the principality of Tyrone.' The King of Munster is then described as proceeding through Tyrone, Ulster, Meath, Leinster, and Ossory, everywhere bestowing gifts on the rulers, and receiving entertainment in return. I suspect that the entertainment is of more historical reality than the royal gifts. The practice, however, described with this splendour by the chronicler or bard, is plainly the same as the cutting and coshering which Spenser and others denounce as one of the curses of Ireland.

There is reason to believe that the English Kings itinerated in the same way and mainly for the same purpose. The 'Eyres' of the Anglo-Saxon Kings are described by Palgrave in his 'Rise of the English Commonwealth' (i. 286). The lawyer might suspect the continuance of the practice from the comparative obscurity of some of the places at which some of the most permanently important of our old statutes were enacted—Clarendon, Merton, Marlbridge, Acton Burnell. The novel-reader comes upon a survival of it in 'Kenilworth,' for the progresses of so late a sovereign as Elizabeth were certainly descended from the itinerancy of her predecessors. But there is other evidence of a rather remarkable kind. Two historical scholars, Mr. Eyton and the late Sir T. Duffus Hardy, have constructed from documentary testimony accounts of the movement from place to place, during a long space of time, of two of our English Kings, King Henry II. and King John. Neither of them of course is a very ancient King, and in both there may have been a certain amount of native restlessness, but their activity, though it may have been excessive, was certainly not a new royal habit. I take the movements of King John for notice, because his reign makes an epoch not only in English political but in English judicial history. Sir Thomas Hardy's 'Itinerary of King John' gives the places at which that King is found to have stayed during every month of every year from 1200 to 1216, the regnant year then beginning on Ascension Day. I take almost at a venture May of 1207. On the 1st of May the King is found at Pontefract, on the 3rd at Derby, on the 4th at Hunston, on the 5th at Lichfield, on the 8th at Gloucester, on the 10th at Bristol, on the 13th at Bath, on the 16th at Marlborough, on the 18th at Ludgershall, on the 20th at Winchester, on the 22nd at Southampton, on the 24th at Porchester, on the 27th at Aldingbourn, on the 28th at Arundel, on the 29th at Knep Castle, and on the 31st at Lewes. The King must of course have made all these journeys on horseback over a country scarcely provided with any roads except the Roman roads. But, again, I will take June in 1212, when the King goes to a more distant and more impracticable tract of country. On June 4th he leaves the Tower of London, and on the 28th is at Durham, having been in the meantime to Hertford, Doncaster, Richmond in Yorkshire, Bowes, Appleby, Wigton in Cumberland, Carlisle and Hexham. What is still more remarkable, he marches at much the same rate in Ireland, which was then as little known and as impassable a country as now are the wildest parts of the Sierra Nevada. He reaches Waterford with his troops from Haverfordwest on June 20th, 1210, and is back again at the end of August, having been at every place of importance in the south-eastern half of the country. It must be understood that I am not selecting periods in which the King's movements were exceptional or his activity greater than usual. This was practically his life during every month of every year of his reign. King John passes for an effeminate sovereign, but no commercial traveller of our day, employed by a pushing house of business, was ever, I believe, so incessantly in movement, and for so many successive years, with all the help of railways.

We are able to see how the itinerant King gradually became a monarch of the modern type. The change may be attributed to the growth of the system of *missi*, of itinerant deputies of the sovereign, his servants, as the English phrase was, *in eyre*. The first employment of the *missi* was much older than the reign of King John on the Continent, and considerably older in England. But, as is usual in such cases, one system did not all at once displace the other, and Kings, though gradually becoming more stationary or sedentary, did not suddenly cease to move about their dominions when they began to be represented by itinerant justices or deputies of their own. The transition, however, was hastened in our own country by the great constitutional change of which I will speak presently.

But first of all let us notice how this ambulatory life of the ancient Teutonic King gave him an advantage, as a great judicial authority, over the ancient local Popular Courts which had possibly existed from time immemorial by his side. As I have explained, they contained in themselves certain seeds of decay. Their numerous members had the strongest reasons for evading or slackly discharging what must have seemed to them a most rigorous duty. They had to waste many days and to incur many dangers while travelling by forest and fen to the place of meeting. They had to acquaint themselves with all the circumstances of the cases brought them without any of the aids of a modern Court of Justice. They had often to visit the scene of alleged acts of violence. They had not merely, like a modern jury, to decide on questions of fact; they had also to declare the law or usage and to pronounce the sentence. And then after all this, they might themselves be proceeded against for a wrongful judgment, and even, according to the judicial system of some communities, they might be called upon to defend their sentence in arms. A capitulary of Charles the Bald bids them go to Court armed as for war, for they might have to fight for their jurisdiction; and at a later date the oath of service exacted by the feudal lord constantly bound the vassal just as closely to service in Court as to service in arms. The burden on the poor man was so severe that the Church interfered in his favour, and a Council of the ninth century protested against the cruelty of forcing the poor to do suit in Court.

But while all these causes were weakening and emptying the Popular Courts, the King was constantly perambulating the country, carrying with him that royal justice which had never been dissociated from him since his dignity existed.[4] The justice which he dispensed was in the first place complete, since he always by his officers executed his own decrees. It was also irresistible, since he generally had with him the flower of the military strength of the country. It was probably purer than that of the popular tribunal, which was certainly not inaccessible to corruption; and it was more exact, for anything like precise legal knowledge was very much confined to the experts who followed the King in his progresses. Moreover, in those days, whatever answered to what we now call the spirit of reform was confined to the King and his advisers; he alone introduced comparative gentleness into the law and simplified its procedure. Thus the royal justice was ever waxing while the popular justice was waning; and from the ascendency which the first finally attained are in fact descended most of the characteristics which we associate with the law, and which some theorists declare

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[4] A passage in an interesting book, Drew's *Kashmir and Jummoo*, curiously illustrates the character of the ancient royal jurisdiction, and also one of the motives which produced the King's activity in exercising it. Here is an account of what still goes on in the Curia Regis of the Maharajah of Cashmere, himself a sovereign much more modern than the system he follows. Gholab Singh, the first of the dynasty which was established by the English in 1846, was (says Mr. Drew) 'always accessible, patient and ready to listen to complaints. He was much given to looking into details, so that the smallest thing might be brought before him and receive his consideration. With the customary offering of a rupee, any one could get his ear; even in a crowd one could catch his eye by holding up a rupee and calling out " My Lord the King,

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a petition!" He would pounce down like a hawk on the money, and, having appropriated it, would patiently hear out the petitioner. Once a man after this fashion making his complaint, when the Maharajah was taking the rupee, closed his hand on it and said, "No; first hear what I have got to say." Even this did not go beyond Gholab Singh's patience; he waited till the man had told his tale and opened his hand; then, taking the money, he gave orders about the case.' 'The civil and criminal cases,' it is afterwards stated, 'have usually been previously inquired into by judicial officers in the Courts of First Instance, and perhaps have been adjudicated upon by the Court of Appeal; but it is open to suitors and complainants to try their fortune with the Maharajah himself.'

to be inseparable from it—uniformity, inflexibility, and irresistibility.

It may almost be laid down that in England nothing wholly perishes. The itinerant King is still represented among us by the Judges of Assize on Circuit; the ancient Popular Court survives in the Jury, though in the last instance the line of descent is far dimmer and far more broken than in the first. When John reigned, the delegation of the royal authority to itinerant servants of the King for some purposes had long been known; but one branch of royal jurisdiction, that over the Common Pleas, or in other words over the greatest part of the more important civil litigation of the nation, was carried about with him by the King in those surprising progresses of which I have spoken. Hence gradually arose a great abuse. In primitive times, when questions were simple, the King as he approached each local centre in turn had perhaps no difficulty in deciding every case which came before him before he went away. But, as a more complex and wealthier society arose, there was the greatest difficulty in getting the King, as it was called, to give the suitor a day. Sir Francis Palgrave has printed in the second volume of his 'Rise of the English Commonwealth' a most curious document, which is the account given by one Richard de Anesty of the trouble and charges to which he was put in respect of a mixed civil and ecclesiastical case which he had before the Archbishop of Canterbury and the King. Besides infinite vexation from the Ecclesiastical Courts, he had to follow Henry II. across the sea to France and up and down England before he could get his day. After reading this paper, we gain a vivid idea of the importance of the provision in the Great Charter that the 'Common Pleas shall no longer follow the King.' This is a great judicial epoch, marking a revolution in judicature; and King John at once proceeded to illustrate the necessity for it. He sealed Magna Charta at Runnymede on June 15, 1215, and before July 15 he had been over the whole of the south of England and again northwards as far as Oxford. Meantime the judges of the Common Pleas were sitting—as they did ever since till the Court of Common Pleas was absorbed the other day in the High Court of Justice—at Westminster, and at Westminster only.

With the sealing of the Great Charter the early history of the relation of the English King to civil justice comes to a close, and the modern English judicial system is established. It is distinguished in some respects from the corresponding systems of the European Continent, though these too were results of the same general causes. It is the most highly centralised system of judicial administration in the world, all the important branches of judicial business being localised in London, and a portion only diffused through the country by Judges in eyre, the old *missi* sent from the side of the King. The only considerable modification of these principles was made when the modern County Courts were established, courts extremely unlike the old Shire Courts. These last have left the merest trace behind them, perhaps in some mound now overgrown with trees which marks their ancient place of open-air meeting, perhaps in some trifling fine imposed on landholders for failing to attend a non-existent tribunal. Even with the addition of the newer County Courts, the English judicial system has another feature peculiar to itself—the fewness of the judges employed in administering justice.

If you look across the channel to France, you find these characteristics reversed — comparatively little judicial centralisation, a large number of local courts, a multitude of judges distributed over the various tribunals. The French King, like the English King, became the theoretical fountain of justice, but the effect was produced much more by the zeal with which expert lawyers trained in the Roman law preached his authority than by direct supersession of the local courts by emissaries of his own. On the other hand, the character of the law itself, however administered, was much more changed in France and on the Continent generally than in England. The Roman law gained everywhere a considerable, and here and there a complete, ascendency over ancient custom, and the French Civil Code, the outcome of the Revolution, is only a version of Roman jurisprudence. But, though much is obscure in the beginnings of what we Englishmen call the Common Law, it was undoubtedly in the main a version of Germanic usage, generalised by the King's courts and justices. Some savour of the ancient opposition between the popular justice and the royal justice still clung about it, since we know that, theoretically administered in the King's name, it came at a much later date to be thought the barrier of popular liberty against assertions of prerogative by Tudor and Stuart. Meantime that residuary authority over law and justice, which was never in ancient times quite dissociated from the King, survived the maturity of the common law. From this sprang the jurisdiction of the Court of Chancery, which cannot be said to have ever been exactly popular, but which certainly owed whatever unpopularity attached to it not to any supposed inherent badness, but to incidental vices, its dilatoriness and its costliness. But then from this same residuary authority arose the criminal jurisdiction of the Star Chamber, which has become with ordinary English historians a very proverb of judicial oppression. The true historical difference, however, between the so-called equity of the Court of Chancery, and the illegalities and unconstitutionalities of the Star

Chamber, is that one had its origin before the authority whence it sprang had been seriously questioned, while the other did not obtain an effectual jurisdiction till its time had gone by. The depth of discredit into which Star-Chamber justice fell marks the decline and fall of the King's beneficial influence over law. The royal judicial authority was once the most valuable and indeed the most indispensable of all reforming agencies, but at length its course was run, and in nearly all civilised societies its inheritance has devolved upon elective legislatures, themselves everywhere in the western world the children of the British Parliament.

CHAPTER VII.

THEORIES OF PRIMITIVE SOCIETY.

SOME years ago (in 1861) I published a work (on 'Ancient Law') which I described in the preface as having for its chief object to 'indicate some of the earliest ideas of mankind as they are reflected in Ancient Law, and to point out the relation of these ideas to modern thought.' It was not part of my object to determine the absolute origin of human society. I have written very few pages which have any bearing on the subject, and I must confess a certain distaste for inquiries which, when I have attempted to push them far, have always landed me in mudbanks and fog. The undertaking which I have followed in the work just mentioned, and in others, has been to trace the real, as opposed to the imaginary, or the arbitrarily assumed, history of the institutions of civilised men. When I began it, several years before 1861, the background was obscured and the route beyond a certain point obstructed by *à priori* theories based on the hypothesis of a law and state of Nature. In endeavouring to get past this barrier, I had occasion to point out the claims of the so-called Patriarchal theory of society to be considered a real historical theory; that is, as a theory giving an account upon rational evidence of primitive or very ancient social order. The Patriarchal theory is the theory of the origin of society in separate families, held together by the authority and protection of the eldest valid male ascendant; and, having dwelt on the peculiar importance of Roman law in investigations such as I was prosecuting, I insisted in a few pages of my book on the testimony to this theory supplied by the earliest records of Roman jurisprudence. We have not indeed knowledge of any working system of institutions in which the Family exactly corresponds to the primitive family assumed by the theory. The Roman law, as a working system, takes a view of Family and Kinship not very different from that accepted in modern societies, but we happen to have unusual facilities for ascertaining a very ancient condition of this law, and it is not possible to doubt that, when the law was in this state, the Family and the Kinship of which it took cognisance had for their basis the authority of the eldest male ascendant. Other bodies of old usage and legal rule, less perfectly known to us than the Roman from the scantiness or the inferior quality of their materials, seemed to me to suggest that a Family organised on the Patriarchal model had been the near or remote antecedent of the Family which they reflected. The Hindu law appeared to me to suggest this very strongly. So did Slavonian law, as far as it was known. Greek law seemed to point to the same conclusion, less distinctly yet not very obscurely; and, more doubtfully, the ancient law of the Teutonic races. The evidence appeared to me very much of the same kind and strength as that which convinces the comparative philologist that a number of words in different Aryan languages had a common ancestral form in a now unknown ancestral mother tongue; but I stated with some caution the opinion that, at that stage of the inquiry, 'the difficulty was to know where to stop and to say of what races of mankind it was not allowable to lay down that the society in which they were united was originally organised on the patriarchal model' ('Ancient Law,' 123). My book was published in 1861, and delivered as lectures in the four or five previous years, and it is needless to say that, since then, all this evidence has been added to, re-examined, and placed in new lights. We now can discern something of the real relation which the sacerdotal Hindu law bears to the true ancient law of the race. Slavonian law and usage, chiefly known in 1861 from the books of Haxthausen, is becoming a more trustworthy subject of study through the labours of Prof. Bogišić. The earliest monuments of German law have been repeatedly fought over by earnest controversialists, with no very certain result. The Irish Brehon law, once inaccessible, is gradually becoming known to students of archæology. Still, if the inquiry were to be confined to the ancient institutions of the group of societies which I examined more than twenty years ago, I should maintain the conclusions which I reached, subject only to some qualifications which are suggested in the first four chapters of the present work. But much testimony of an altogether new kind has been obtained, since I wrote, from the ideas and usages of societies which live in a condition of barbarism or savagery, and the two zealous inquirers, now lost to us, J. F. McLennan and L. H. Morgan, who have put this testimony into order, have been led by it to form opinions on the primitive or very early condition of human society which they themselves at all events consider to be quite inconsistent with the Patriarchal theory. I am desirous of stating in what light I see these new facts and theories, and of showing at the same time that I have not neglected the friendly challenge to examine them which Mr. J. F. McLennan addressed to me in the preface to his 'Studies in Ancient History.' I trust that the general considerations to which I have been conducted may obtain some attention from persons more versed than I am in this special line of study; but I do not print them without some reluctance, since, as will appear from remarks in the following pages, I am not satisfied that the investigation has advanced far enough to admit of a very confident opinion.

The Patriarchal theory of society is, as I have said, the theory of its origin in separate families, held together by the authority and protection of the eldest valid male ascendant. It is unnecessary to add that this theory is of considerable antiquity. So far as we can judge, it first occurred to the great Greek observers and philosophical thinkers of the fourth century before Christ. Plato ('Laws,' iii. 680) and Aristotle ('Politics,' i. 2) both enunciate it, the first briefly, the last with so much detail that little has been added in more recent times to his statement of it. It may be proper here to remark that the theory was not founded by them on mere conjecture. They both profess to base it on actual observation. Plato expressly says that forms of society, answering to the assumed original groups, survived in his day; he calls them by the obscure name δυναστεῖαι ('chieftainships;' Jowett, 'lordships'). Aristotle expressly appeals to the actual social state of 'barbarians.' It should be noted that the opportunities of these observers were such as can never again recur. Living more than 2,000 years ago, they were so much nearer the barbarism of the greater races; the societies open to their observation were not the mere waifs and strays of humanity, but people of the same ethnical stock with themselves and ourselves, lagging, however, far behind the Greeks in civilisation. Aristotle, whom nobody I suppose will deny to have been a good observer, had abundant material for his conclusions. He was born in the scarcely Hellenic city of Stageira. He passed much of his life at the semi-barbarous Court of Pella, where his father was physician to the Macedonian King. And he left a special treatise on 'Barbarian Customs' (*νόμιμα βαρβαρικὰ*), now unfortunately lost.

The Patriarchal theory, during the dark ages, would have shared the fate of much else in Greek speculation if it had not been kept alive by its correspondence with the Scriptural account of the Hebrew Patriarchs. But, in the 17th and 18th centuries, its place was taken by *à priori* theories of the State of Nature which long satisfied curiosity as to the original condition of mankind. Its revival may be said to be owing to Niebuhr's discovery of the 'Commentaries of Gaius,' which, though not directly treating of ancient Roman law, enabled us to divide it into successive stages or strata, and gave us a singularly complete view of the earliest among them. I am not sure, however, that the appeal to Roman law has not done disservice with some minds to the Patriarchal theory. It has encouraged the belief that it referred to a relatively advanced social order. Now Plato and Aristotle clearly intended to describe a highly barbarous condition of the race. They both illustrate it by the Homeric story of the 'Cyclops,' 'who had neither assemblies for consultation nor dooms, but each exercised jurisdiction over (issued dooms to) his wives and children, and they paid no regard to one another.' But the family groups contemplated by the theory are more than barbarous; they are extremely savage, if the test be applied of analogy to the life of animals. The strongest and wisest male rules. He jealously guards his wife or wives. All under his protection are on an equality. The strange child who is taken under it, the stranger who is brought under it to serve, are not distinguished from the child born under the shelter. But when wife, child, or slave escapes, there is an end to all relations with the group, and the kinship which means submission to power or participation in protection is at an end. This is the family (to borrow Sir George Cox's energetic expression) of the wild beast in his den. But when these several relations are decorated with the Roman technical names of Patria Potestas, Manus, Dominion, Adoption, Divorce, Agnation, Emancipation (which mean precisely the same things), an impression of recency is given which some minds are clearly unable to shake off.

The other theory which is now opposed to that long called Patriarchal is the theory of the origin of society, not in the Family but in the Horde. Aristotle and the writers who have followed him suppose that the larger groups of men discernible in the twilight of history have somehow grown out of isolated families like that of the Homeric Cyclops. As these larger groups first show themselves, it is impossible to believe that they are composed throughout of blood-relations, but the Patriarchal theory according to recent interpreters assumes that there is a real core of consanguinity in some or most of them, to which artificial additions have been made by a number of fictions of which Adoption is the type; and that others have been created by a process, not wholly extinct,[1] of imitating a dominant or fashionable model. My own conclusion in my 'Ancient Law' was thus stated: 'The conclusion which is suggested by the evidence is *not* that all early societies were formed by descent from the same ancestor, but that all of them which had any permanence or solidity either were so descended or assumed that they were. An indefinite number of causes may have shattered the primitive groups, but whereever their ingredients recombined, it was on the model or principle of an association of kindred. Whatever were the fact, all thought, language, and law adjusted themselves to the assumption.' The theory, which deserves to be associated with the names of McLennan and Morgan, may be said in some sense to invert this account of the matter. It derives the smaller from the larger group, not the larger from the smaller. Founded, as was the Patriarchal theory, on observation, but on observation of the ideas and practices of the now savage races, it deduces all later social order from the miscellaneous, unorganised Horde. I must confess that I do not find it easy to bring home to myself the nature of the original groups as conceived either by McLennan or by Morgan. But I think I may lay down that these assemblages are regarded as companies of men and women, in which the relations of the sexes were wholly unregulated at first, but passed through various stages of limitation or restriction until the Family, Patriarchal or other, was reached. The modern social order is thus the result of a modified promiscuity. These two most original inquirers differ widely in their determination of the stages through which this course of development passed. Totemism (or the origin of the conception of kinship in the mark placed by savages on their bodies), the slaughter of female children, woman-stealing, polyandry (or a plurality of recognised husbands), and the well-known Levirate, play a great part in the system of Mr. McLennan. Consanguine Marriage, Punaluan Marriage (or the intermarriage of brothers as a group with sisters as a group), and Classificatory Relationship (or the confusion under the same general view and name of all members of the tribe belonging to the same generation) are all-important to Mr. Morgan's theory. But both agree in considering human society as beginning in promiscuity, and as continually modified by its progressive regulation, as beginning in the Horde and as gradually lifting itself till the Family was reached. Both writers seem to me to hold that human society went everywhere through the same series of changes, and Mr. McLennan at any rate expresses himself as if all these stages could be clearly discriminated from one another, and the close of one and the commencement of another announced with the distinctness of the clock-bell, telling the end of the hour.

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[1] See Sir A. Lyall's paper on the 'Formation of Clans and Castes,' now forming Chapter IV. of his *Asiatic Studies*; and see Note A, on 'The Gens,' to Chapter VIII. of the present work.

Before I go further, I think it useful to remark that the point at issue seems to me capable of being more simply stated than it usually is by these writers and their followers. The chief or the one piece of evidence obtained from now savage societies, which points to an original promiscuity, is their habit of tracing relationship for some purposes through females only. When, however, the inference from this characteristic is stated to be that 'the exogamous totem-kin' of McLennan, or the group which Morgan by an unhappy *petitio principii* has called the 'gens,' is necessarily older than the Family, which in all its forms assumes some certainty of male parentage, such language may lead to confusion of thought. The physiological elements of the Family must always have been present, and must always have been the source of the larger groups. A human being can no more, physiologically, be the child of two fathers than of two mothers, and the children of the same man, no less than of the same woman, must always have had something in their nature which distinguished them from every other group of human beings. What therefore is meant is, that though the Family must always have existed, it could not be recognised through prevalent habits, and through the consequent uncertainty of paternity. I think it important to call to notice that the fact alleged is not a fact of human nature but a fact of human knowledge. It is merely intended to be asserted that circumstances long prevented savage men from discovering and recognising paternity, which is matter of inference, as opposed to maternity, which is matter of observation. It is certainly remarkable that, as soon as intelligent curiosity was directed to the question, it seems to have exaggerated the share of paternity in parentage. Probably it was so directed very early; there is a striking remark of M. Fustel de Coulanges, that to the ancient societies based on kinship, the problem of generation was very much what the problem of creation is to the moderns. Euripides[2] distinctly states that in his day the universal physiological doctrine was that the child descended exclusively from the male parent, and Hippocrates (*περὶ παιδίου*), in energetically combating this opinion, and contending that the child descended from both parents, seems to admit that it was a prevalent heresy. For the purpose of agreeing with McLennan and Morgan, we must assume that the not very difficult observation on which the opinion rested could not be made, so brief and so little exclusive was the union of the sexes.

It appears to me that, while the Patriarchal theory and the counter-theory of which I have been speaking each explain reasonably well a certain number of ancient social phenomena, both are open to considerable objection as universal theories of the genesis of society. There are unquestionably many assemblages of savage men so devoid of some of the characteristic features of Patriarchalism that it seems a gratuitous hypothesis to assume that they had passed through it. It ought further to be admitted that much of the archæological evidence for the Patriarchal theory is capable of being so put as to suggest the conclusion that the societies, seen to be almost but not quite in the condition from which the theory supposes them to have started, are approaching that condition or tending towards it, rather than declining from it as an older state. But on the other hand, apart from all disputes as to the value of the evidence in detail, the newer theory is surrounded by difficulties quite as grave or graver. Mr. McLennan compared the state of relations out of which he conceived human society to have lifted itself to that exhibited by the unfortunate class now found in great European cities. But the comparison suggests the reflection that this class is almost wholly infertile; and though doubtless explanations of the phenomenon may be offered, a good deal of evidence[3] (which at the same time I do not represent as conclusive) tends to show that such a state of original promiscuity as that which McLennan and Morgan postulate tends nowadays to a pathological condition very unfavourable to fecundity; and infecundity, amid perpetually belligerent savages, implies weakness and ultimate destruction. A far greater objection is that the theory takes for granted the abeyance, through long ages, of the mightiest of all passions, a passion which man shares with all the higher animals, sexual jealousy. It is thus strongly contrasted with the Patriarchal theory, which virtually assumes this jealousy to be the force binding together and propelling the ancient social order. I will presently deal with this difficulty at greater length.

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[2] Euripides, *Frag. Stobæus*, 77, p. 455—

> 'Αλλ' ἴστ', ἐμοὶ μὲν οὗτος οὐκ ἔσται νόμος
> τὸ μὴ οὐ σέ, μῆτερ, προσφιλῆ νέμειν ἀεὶ,
> καὶ τοῦ δικαίου, καὶ τόκων τῶν σῶν χάριν·
> στέργω δὲ τὸν φύσαντα τῶν πάντων βρότων
> μάλισθ'· ὁρίζω τοῦτο, καὶ σὺ μὴ φθόνει·
> κείνου γὰρ ἐξέβλαστον, οὐδ' ἂν εἷς ἀνὴρ
> γυναικὸς αὐδήσειεν, ἀλλὰ τοῦ πατρός.

This passage is parallel to a better known passage in the *Eumenides* of Æschylus, in which Apollo, as advocate for Orestes, argues that he was not of kin to his mother, Clytemnestra, whom he had killed. The argument seems to me wholly physiological, and not in any way archæological. Apollo, like an advocate of the present day with a doubtful case, appeals to the newest physiology. The 'ancient rules' which the *Eumenides* on the other side declare to be trampled under foot, are those of accepted morality, as may be seen from the first lines of the above fragment.

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[3] An eminent living physiologist (Dr. Carpenter) who visited the West Indies before the abolition of slavery, well remembers

I have never myself imagined that any amount of evidence of law or usage, written or observed, would by itself solve the problems which cluster round the beginnings of human society. 'The imperfection of the geological record' is a mere trifle

the efforts of the Planters to form the negroes into families, as the promiscuity into which they were liable to fall produced infertility, and fertility had become important to the slave-owner through the prohibition of the slave-trade. It should be added that, independently of pathological evils, the same infecundity would follow if the promiscuity arose from a considerable inferiority in number of women to men. It is only under very unusual circumstances that a small number of women would give birth to offspring equalling numerically the whole parent generation, male and female.

to the imperfection of the archæological record. 'What were the motives,' I asked in my 'Ancient Law' (p. 270), 'which originally prompted men to hold together in the family union?' 'To such a question,' I answered, 'Jurisprudence unassisted by other sciences is not competent to give a reply.' This anticipation of aid to be expected from biological science has been fulfilled, and it is remarkable that, while the greatest luminary of ancient science invented or adopted the Patriarchal theory, the greatest name in the science of our day is associated with it. Mr. Darwin appears to me to have been conducted by his own observations and studies to a view of the primitive condition of mankind, which cannot be distinguished from this theory. 'We may conclude ('Descent of Man,' ii. 362) from what we know of the passions of all male quadrupeds that promiscuous intercourse in a state of nature is extremely improbable. . . . If we look far enough back in the stream of time, it is exceedingly improbable that primeval men and women lived promiscuously together. Judging from the social habits of man as he now exists and from most savages being polygamists, the most probable view is that primeval men aboriginally lived in small communities, each with as many wives as he could support or obtain, whom he would have jealously guarded against all other men. . . . In primeval times men . . . would pro bably have lived as polygamists or temporarily as monogamists. . . . They would not at that period have lost one of the strongest of all instincts, common to all the lower animals, the love of their young offspring' (p. 367). With his usual candour Mr. Darwin admits, though with some hesitation, the conclusions of writers who have followed a different path of inquiry from his, but he thinks that the licentiousness attributed to savages belonged to a 'later period when man had advanced in his intellectual powers but retrograded in his instincts.'

It must be remembered that a difference in the nature of the sexual union, answering to the difference of view separating the Patriarchal theory from its opposite, runs through the whole animal world; and, under such circumstances, considering the extreme scantiness of the archæological evidence, it would seem reasonable to call in the testimony of those who have made the animal world their study. When man had most of the animal in him, he belonged to the highest animals; and this is the consideration which gives such importance to Mr. Darwin's opinion. It would be possible to deny, or to shrink from, the absolute conclusion reached in the book (the 'Descent of Man') in which this opinion is stated; and yet it would remain a most wonderful magazine of facts, pointing to the prodigious influence of sexual jealousy in the animal world, a force increasing in intensity as the animal ascends in the scale, and compelling the sexes to associate in groups closely analogous to those in which Plato and Aristotle conceived primitive men to be united. The foreign labourers in the field which McLennan and Morgan have occupied with us, have mostly had the advantage of biological training; and they seem all to have formed the same conclusion as Mr. Darwin. Dr. Letourneau, whose very full and very valuable compendium of the facts of savage life contains a protest against the modern English theories as premature,[4] is quite clear as to the nature of the primitive family. 'Nos primitifs ancêtres errèrent alors dans les forêts par petits groupes, composés chacun du père (du mâle plutôt), de sa ou de ses femmes, des jeunes ; le tout formant une association temporaire sous l'autorité paternelle' (Letourneau, 'La Sociologie,' p. 379). Dr. Le Bon ('L'Homme et les Sociétés,' ii. 284) strongly denies that the state of promiscuity could be the earliest state of mankind. 'Dans les sociétés des animaux qui se rapprochent le plus de notre espèce, nous voyons l'animal, monogame ou polygame, toujours jaloux de ses prérogatives sexuelles, les défendre avec l'énergie pendant le temps plus ou moins long que dure son union, c'est-à-dire au moins pendant la période nécessaire pour élever ses petits.' There can be no question that this is the result arrived at whenever the higher animals are strong enough to give full rein to sexual jealousy. But sexual jealousy, indulged through Power, might serve as a definition of the Patriarchal Family.

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[4] Ces faits et bien d'autres prouvent combien il est prématuré aujourd'hui de prétendre formuler des lois sociologiques, précises et rigoureuses, comme des lois scientifiques. Rassembler des faits, les grouper, et hasarder prudemment quelques théories générales, sujettes à révision : voilà à peu près tout ce que nous pouvons nous permettre dans nos essais de sociologie (Letourneau, p. 320). La prudence du serpent est la vertu qu'il ne faut pas se lasser de recommander aux sociologistes de nos jours (p. 332).

If, however, the human race may still be believed to have started with the Patriarchal Family, how are we to explain the many remarkable phenomena of savagery and infant civilisation for the first time noticed by McLennan and Morgan, and woven by them into rival theories of the original condition of mankind? The inference that they point to an absolute promiscuity must be received with the greatest hesitation, both for Mr. Darwin's reasons and because the evils which such a condition would draw with it would possibly lead to the extinction or the dangerous weakening of the societies which practised it. But it cannot be doubted that these phenomena do suggest such a relation of the sexes as may be supposed to leave the paternity of children in much uncertainty. The explanation appears to me to lie partly in Mr. Darwin's conjecture that these phenomena belong to a 'later period when man had advanced in his intellectual power but retrograded in his instincts,' and partly in McLennan's hypothesis of a great (and, he appears to think, an universal) deficiency of women in the primitive groups of men. It is not hard to see that the cause assigned by McLennan for the phenomena is a *vera causa*—it is capable of producing the effects. We must remember that the monogamy now practised by the greatest part of mankind (and even by the so-called polygamous races) is closely connected with a primary natural fact, the near equality of the two sexes in numbers. The idle conjectures which were once common as to the preponderance of male and female births have been set aside by observation, which shows that these births are as nearly as possible equal in number. At the same time, in settled modern communities, the number of grown women is, on the whole, in excess of the number of grown men, because of the more rapid exhaustion of the males through war or dangerous adventure. Let us, however, for a moment, and for the sake of argument, assume that balance to be very seriously disturbed. Let us suppose a community in which for long periods together there is a large excess of females over males. There is no question that monogamy might be substantially maintained in such a community, by the precepts of some widely diffused religion, or by a morality derived from some former age or from some external source; but on the whole we should expect that such a community would, in some of its parts, be polygamous. Again, let us make the counter-hypothesis and suppose a population in which there is an excess of males over females. Here again the Family, as we understand it, the Family founded on monogamy, might be long preserved by the powerful sanctions of religion, morality, or law; but nobody would be surprised that the practices witnessed to as prevailing among savages, had here established themselves now or at some former time, that morality and law had adjusted themselves to social habits, and that explanations of them or justifications of them were even to be found in religion. Institutions savouring of such a social condition might still be in existence, though they had lost all reality, and though the natural balance of the sexes had been restored, since the mere survival of an institution proves nothing as to the length of time which may have elapsed since it was produced by circumstances.

Now that, during a large part of human history, portions of the human race have suffered from a disproportion of females as compared with males, is in a high degree probable. McLennan, as is well known, explained it by the virtually universal prevalence of infanticide, confined to female children. This position was not accepted by Morgan, and, if asserted of the whole human race, has generally been considered as not credible. Nevertheless it may well be believed that under unfavourable circumstances savage men have constantly prevented their weaker offspring from living. But there are many other causes of the disproportion of the sexes which disclose themselves in the twilight of history. A great part of the race, when we first obtain a glimpse of it, is in a state of movement. Portions have been torn away from larger aggregates and are wandering far and wide, either pressed by enemies or searching for more abundant food. No community, when first seen by the historian, can be certainly said to occupy its original seat. It is in a high degree likely that these wandering bodies included more men than women. There is evidence that some of the islands of the Pacific were populated by boat-loads of men and a few women, and it would be no very violent conjecture that the aborigines of Australia and America originally reached their present homes with the sexes in this proportion.

It is needless to say what would be the character of the institutions which would establish themselves under such circumstances. In fact, it may be said to have been the usages of the Australians and American Indians which respectively suggested the theories of McLennan and Morgan, and it is singular how often, wherever a dim glimpse of similar institutions is caught elsewhere, it is amid societies originally settled, like the Irish, by wanderers over the sea. An even more active cause of inequality between the sexes must have been war; and we may freely admit the importance and significance of those practices of woman-stealing on which McLennan dwells so emphatically, if only we remember that, if some communities lost their women through defeat, others must have gained through victory. I will call attention to one striking monument of the scale on which this loss and gain occurred, which has not been much noticed. It is an Egyptian inscription, on the reverse of a stele in the Berlin Museum, commemorating the results of a conquering expedition.

Line 20. I sent my bowmen against the foes in the town of Makhenunem. They smote it and made a great slaughter, taking all the women prisoners and all the beasts of burden—505,349 Bulls, and Women 2,236.

Line 25. I made a slaughter among all that were the chief of the Land of Lobardu. All the gold he had, Bulls 203,346, Horned Cattle 603,108. All the women who were spared, the chief gave us.

Line 27. I sent my soldiers against Arrosa. I made a great slaughter, taking all the women prisoners. Bulls 22,110. All the women.

Line 29. From Makhisherkert, I took all the... men? All the women.

Line 32. I made a great slaughter against those with the chief of Tamakliv. I took all their wives, all their horses. Bulls 35,330.

In all this inscription, which is a long one, there is only one line which may be thought to speak of taking the men alive, and there the reading is doubtful. With other records of ancient warfare, it leaves on my mind no doubt that the common rule of tribal victory was to take only the women. The men escaped or were slain ; but the women and perhaps the children were spared for servitude, and this seems to be the point of the well-known exhortation of Greek generals to Greek soldiers on the eve of battle.

I think then that it must be allowed to be more than probable that, since the appearance of mankind on the earth, an indefinite portion of the race has suffered at different times from a serious inferiority in numbers of women to men. It must further be acknowledged that the advance in intelligence of which Darwin speaks would lead men to establish institutions in conformity with this proportion between the sexes, if only for the purpose of keeping within bounds that sexual jealousy which could not fail under such circumstances to produce, if unrestrained, a perpetuity of violence and bloodshed. It must be admitted that the tendency of such institutions would be to arrange men and women in groups very unlike those in which, according to the biologists and according to the Patriarchal theory, they were originally combined. If however it be impossible to say what portion of the human race has suffered from this disproportion between the sexes—if we are unable to deny that some fragments of the vast aggregates of men speaking languages of the Aryan and Semitic stocks may conceivably at some time or other have had this experience—what use, it may be asked, is there in insisting on the Patriarchal theory as expressing the primitive grouping of mankind? I answer that there is the greatest use; and that, unless we bring home to ourselves all that is implied in the Patriarchal theory, it is impossible to understand a number of phenomena which McLennan and Morgan leave unexplained or explain unsatisfactorily.

The Patriarchal theory in the first place fixes oc Power, the Power of the strong man, as the principal formative cause of the groups within which the conception of kinship first grew up. The counter-theories assume the abeyance, during long ages, of Power. On this, beyond noting the improbability of the assumption, I will merely now remark that the only source known to us of new forms of kinship is Power. It is a special form of Power, that called by jurists Sovereignty, which has created the modern

Kinship known as Nationality, which enables us to speak of Englishmen, Frenchmen, Australians, Americans. In the next place the Patriarchal theory supposes that the motive which led to the exertion of power was sexual jealousy. The counter-theories assume the abeyance during long ages of sexual jealousy. Now it is of course possible to believe, upon sufficient evidence, that the passion which caused the wrath of Achilles and the agony of Othello was unknown to men originally, or was neutralised by the countervailing pressure of circumstances ; but if it be once believed that this passion, which is one of the mightiest of the forces acting on man in the height of his moral strength and the plenitude of his intellectual vigour, was also one of the most uncontrollable of his instincts when he had most of the animal in him, the whole of the recently observed phenomena appear to me to show themselves in a light materially different from that in which the observers have seen them.

The student, then, of social archæology who is called upon to believe that the Family constituted by sexual jealousy indulging itself through Power is of modern origin or of rare occurrence, will be very rigorous in his scrutiny of the evidence presented to him.[5] He will be cautious in accepting a statement about savages, or an interpretation of a 'survival' in a system of institutions, which is *primâ facie* at variance with observed facts of human nature.

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[5] See Note A to this Chapter, on the 'Andaman Islanders.'

Admitting it to be probable, as he is bound to do, that some portions of mankind have at some time been united in groups, which included considerably fewer women than men, and allowing that this scarcity of women would probably result in such institutions as the tracing kinship through descent from females, he will see reasons for thinking that the condition out of which these institutions arose could not, as a general rule, be more than temporary. A tribe in which the women were for a very long period inferior in number to the men would be at a great disadvantage compared with tribes in which the sexes were on a near equality. It would be liable to infecundity, possibly from disease, certainly from the relative fewness of births from a small number of mothers.

Again, he will understand better than the recent inquirers how it was that all the societies which, if I may use the expression, attained to any degree of respectability, recovered at last what he will believe to have been the original condition of the Family. Nothing is more unsatisfactory in the writings of McLennan and Morgan than their account of the recognition of Paternity. Morgan seems almost to suppose that it was introduced by popular vote. McLennan expressly suggests that it arose from a custom of putative fathers giving presents to putative children. But the truth is that a great natural force must always have acted, and must be still acting, on these aberrant forms of society, tending always to make the most powerful portion of each community arrange itself in groups, which admit of the recognition of fatherhood, and the indulgence of the parental instincts. And thus reasons appear why it is that, when the Family does reappear, it reappears not as the modern Family, but as the Family in which Kinship is blended with Power, and why it is that the Family so often discloses itself as an institution of aristocracies, not of slaves, nor even of dependents.

He too who is alive to the nature of this great emotional force, ever acting upon the class of societies of which I have been speaking, will be slow to believe that they recovered all or much of their original condition by a series of changes identically the same. He will rather suspect that the stages of recovery were infinitely various. Thus he will be indifferent to many or most of the points of controversy between the school of McLennan and the school of Morgan, and will be inclined to think that there has been room, not only for two, but for many courses of modification and development, each proceeding within its own area. So far as I am aware, there is nothing in the recorded history of society to justify the belief that, during that vast chapter of its growth which is wholly unwritten, the same transformations of social constitution succeeded one another everywhere, uniformly if not simultaneously. A strong force lying deep in human nature, and never at rest, might no doubt in the long run produce an uniform result, in spite of the vast varieties of circumstance accompanying the stern struggle for existence; but it is in the highest degree incredible that the action of this force would be uniform from beginning to end.

Lastly, if we consider the weight of argument and evidence to be in favour of the commencement of human society in Patriarchal (or Cyclopean) families, we shall think it not only not incredible but highly probable that certain communities which have survived to historical times have grown without interruption out of their original condition. 'In most of the Greek States and in Rome,' I wrote in 'Ancient Law' (p. 128), 'there long remained the vestiges of an ascending series of groups out of which the State was at first constituted. The Family, House, and Tribe of the Romans may be taken as the type of them, and they are so described to us that we can scarcely help conceiving them as a series of concentric circles which have expanded from the same point. The elementary group is the Family, connected by common subjection to the highest male ascendant. The aggregation of Families forms the Gens or House. The aggregation of Houses makes the Tribe. The aggregation of Tribes constitutes the Commonwealth. Are we at liberty to follow these indications and to lay down that the commonwealth is a collection of persons united by common descent from the progenitor of an original family? Of this we may at least be certain, that all ancient societies regarded themselves as having proceeded from one original stock.' Antecedently, is it necessary to assume that such societies passed through a stage of promiscuity, more or less modified? That would depend on the circumstances in which they were placed. If they suffered from a scarcity of women, such phenomena as polyandry and a tracing of kinship through women would probably show themselves, and at any stage of social growth. But some communities of men must always have been stronger, cleverer, more fortunately placed than others—must have had fewer motives than others for killing their female children, and more success in carrying away the women of other tribes. The great reason for antecedently doubting the alleged evidence of promiscuity in the branches of the Aryan race is that, as it has been the most successful, so it must have been one of the strongest of races. Of course the significance of some pieces of this evidence cannot fairly be denied, nor can it be thought very unlikely that some of the divisions of this race which wandered furthest, or some of the more savage communities which adopted its tongue, fell for a while into a more or less modified promiscuity. But the whole question must be decided by the preponderance one way or the other of the not very plentiful evidence. Only let it be clearly understood what the problem is. I have recently stated it in the following words:[6] 'The greatest races of mankind when they first appear to us show themselves at or near a stage of development in which relationship or kinship is reckoned exclusively through males. They are in this stage; or they are tending to reach it; or they are retreating from it. Many of them, in certain contingencies, generally rare or remote, give women and the descendants of women a place in succession; and the question with modern inquirers is whether the place thus assigned to them is the survival of an older barbarism, now exemplified in savage races, which traced kinship exclusively through females, or whether it results from the dissolution, under various influences, of "agnatic" relationship, that is, of relationship through males only.' The 'influences' in question (I have elsewhere shown) were in the case of the Roman law, that of the Prætorian equity, and in the case of the sacerdotal Hindu law, the influence of Religion.

I have yet a few words to say on a topic which owes the importance and interest now commanded by it almost entirely to the labours of Mr. J. F.

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[6] *Vide* Chapter V. above, p. 149.

McLennan. He is the author of the terms 'Exogamy' and 'Endogamy'; the first signifying the practice of taking wives exclusively beyond the limits of a particular tribal circle; the last indicating the custom of marrying within that circle. The fact that certain ancient races extended their prohibitions of intermarriage far beyond the narrow boundaries of our Table of Prohibited Degrees—that, theoretically at all events, they forbade a man's marrying any woman whose descent from the same ancestor with himself was ascertainable—was not unknown to students of Hindu law; but Mr. McLennan was the first to point out the wide prevalence of these prohibitions among barbarous societies and their connection, among savage races, with the system of reckoning kinship through women. The first remark which I have to make on these discoveries, which are closely interwoven with Mr. McLennan's theory of social advance, is, that it does not seem to me certain that the terms 'exogamy' and 'endogamy' can be directly opposed to one another. Is there any society which is not at the same time 'exogamous' and 'endogamous'? Let us fix our ideas, as it is always desirable to do, by looking at the ancient Roman law. Any marriage of a Roman citizen within a circle not widely different from that traced by our own Table of Prohibited Degrees was invalid; and the children of such a marriage would be illegitimate. But again, any marriage of a Roman citizen with a woman who was not herself a Roman citizen, or who did not belong to a community having the much-valued and always expressly conferred privilege of *connubium* with Rome, was also invalid ; and no legitimate children could be born of such a marriage. Thus Roman society was both exogamous and endogamous ; there was both an outer and an inner limit. The double rule is found in the Hindu law. A Hindu may not marry a woman belonging to the same *gotra*, all members of the *gotra* being theoretically supposed to have descended from the same ancestor ; but then he *must* marry within his own caste. Here again, therefore, there is the outer and the inner limit. I do not pretend that the point is proved by the evidence respecting the great number of savage or barbarous tribes which have been shown to have an extended 'exogamy.' My suggestion in fact is that the outer limit within which a man must marry has been overlooked through the interest excited by the long unnoticed exogamous prohibition ; and I wish to urge that the subject requires re-investigation. I myself, though not a professed inquirer in this field, have repeatedly found indications of the outer or endogamous limit. Thus there are in China large bodies of related clansmen, each generally bearing the same clan-name. They are 'exogamous' ; no man will marry a woman having the same clan-name with himself ; and much has been made of this fact. But one of a group of earnest inquirers, who are investigating Chinese social phenomena on the spot, Mr. Jamieson, has found that they are endogamous also. 'Externally they are endogamous—they refuse marriage with any surrounding tribe; internally they are exogamous; they refuse marriage with anyone whose surname shows him to be of the same stock' ('China Review,' vol. x. No. 2).

These limits, outer and inner, may still be discerned in the most civilised Western societies. On the one hand, 'exogamy' is enforced by law. There are always some of his near kin whom a man may not marry. The law rests partly on considerations of physiology and partly on considerations of religion, religion and physiology not being, however, quite agreed as to what should be the proper Table of Prohibited Degrees. On the other, the outer or endogamous limit, within which a man or woman must marry, has been mostly taken under the shelter of fashion or prejudice. It is but faintly traced in England, though not wholly obscured. It is (or perhaps was) rather more distinctly marked in the United States, through prejudices against the blending of white and coloured blood. But in Germany certain hereditary dignities are still forfeited by a marriage beyond the forbidden limits; and in France, in spite of all formal institutions, marriages between a person belonging to the noblesse and a person belonging to the bourgeoisie (distinguished roughly from one another by the particle 'de') are wonderfully rare, though they are not unknown. The Church, it may be added, has repeatedly relaxed the 'exogamous' rule which forbids the intermarriage of near kin in order to save a member of a great Continental House from having to transgress the outer limit within which he is bound to marry.

I have a special reason for dwelling on the point. Exogamy plays a great part in the system of McLennan, and (though not under the same name) in the system of Morgan. Both hold that a definite stage of human development is marked by the appearance of a group which Morgan calls the 'Gens' and McLennan the 'exogamous totem-kin,' a body of kinsmen and kinswomen never intermarrying and witnessing to their kinship by a common mark on their persons. In so far as this group has fallen under actual observation, in America and Australia, it is more like a Sex than any other assemblage of human beings; it cannot reproduce itself unless it combines with some similar body, for the men cannot find wives nor the women husbands. Consequently it is always nowadays a part of some larger social aggregate. But, although I may not have clearly realised McLennan's conception, I understand him to consider that this group is the developed form of the independent primitive group, which he believes to have been an assemblage of men and much fewer women, living together in promiscuity, and therefore very unlike the Patriarchal or Cyclopean family assumed by the older theory. The fewness of women was produced by infanticide, and had for its consequence the habit of stealing women from other groups, still supposed to be witnessed to by the form of capture widely characterising the marriages of barbarians. Under the influence of this habit the practice of 'exogamy' was gradually created. On the other hand, Morgan, though he too believes the sexes to have originally lived together in promiscuity, does not seem to consider that their numbers were very unequal. He supposes that primitive men very early discovered the evils of close interbreeding, and that all the early transformations of human society were the results of a constant struggle to prevent these evils. In his view, therefore (as I understand it), the 'Gens,' as he rather unfortunately calls it (the 'exogamous totem-kin' of McLennan), is not a primitive group, but a mere subdivision of larger tribal societies originally promiscuous, formed for the purpose of limiting interbreeding.

For reasons which I have already given, I have no wish to take sides with Morgan or with McLennan, but it does seem to me that, if further inquiry should disclose the prevalence of an outer 'endogamous' as well as an inner 'exogamous' circle of consanguinity, it lends some strength to Morgan's theory of development, which is certainly easier to understand than McLennan's. I merely accept Morgan's theory so far as it is an explanation of the original formation of exogamous groups, and in so far as it considers them to have been subdivisions of larger communities, and formed for the purpose of limiting interbreeding. The difficulty which seems to be felt by candid opponents of this hypothesis is that primitive men are unlikely to have made any such physiological discovery. If it be true that interbreeding is an evil, its very truth, in their view, militates against the antiquity of human knowledge about it. Indeed it is not certain that it is true. Physiologists are not agreed as to Tables of Prohibited Degrees. Some no doubt would considerably extend them, but others deny that the evil which they prevent is of serious proportions. I think, however, it is forgotten that the assertion made by Morgan is made of a time when neither Surgery nor Medicine existed, of a time before that at which, according to the Greek tradition, Prometheus discovered the chopped herbs which were to be the remedy for human ailments. With the vast resources of modern medicine at hand, the evils of the intermarriage of near kin may have been reduced to a minimum or may have come to be doubted. But what is invaluable to a savage is, I take it, what we should call a good constitution; such a constitution received at birth as will not easily admit disease, or will easily overcome it by its own native soundness. For among such men disease once contracted cannot be artificially cured. Even therefore if the advantage given by exogamous marriage to the children be now a slight one, it might be beyond price to primitive mankind. I cannot see why the men who discovered the use of fire and selected the wild forms of certain animals for domestication and of vegetables for cultivation should not find out that children of unsound constitutions were born of nearly related parents. If such children, left to themselves, are really weakly, the fact would be forced on notice by the stern process of natural selection, affecting either the individual or the tribe. It is this process which has produced those wonderful contrivances for the intercrossing of plants and the generation of a healthier vegetable offspring which have recently been observed by men of science; but if the process ever acted without check on mankind I should imagine that their earliest intelligence would enable them to note its operation. It should be added that the earliest serious attempts to combat disease appear to have taken the form of precautions, of training and of the formation of habits, rather than of remedies as now understood

NOTES AND ILLUSTRATIONS.

NOTE A.

THE ANDAMAN ISLANDERS.

I AM afraid that I incurred some reproach by remarking in an earlier work ('Village Communities in the East and West') on the unconvincing character of much of the evidence for savage customs to which the utmost significance had been attributed, and by speaking of some of it as 'travellers' tales.' My observations on this evidence (which has since then considerably improved) were coupled with a statement that I expected much from the critical examination which was being given to savage or barbarous usage by officers of the Indian Government engaged in the administration of the so-called aboriginal races still numerous in India. The expectation has been abundantly fulfilled already, and I will instance one set of results.

I suppose that if there was one community which, looked at from a distance, or at occasional intervals, seemed more than others to constitute the 'missing link' between the brute and the man, it was the population of the Andaman Islands. In the Preface to 'Selections from Records of the Government of India (Home Department),' No. XXV., written before these islands were finally made the seat of a convict station, it is said that 'it is impossible to imagine any human beings to be lower in the scale of civilisation than are the Andaman savages. The little that is known of their manners and customs proves them to be without religion or government, and that they live in perpetual dread of the contact of any other race. . . . The traditions of so absolutely barbarous a race are not likely to throw any light on their origin.' The little evidence that existed seemed fully to bear out this unfavourable judgment. The older Oriental accounts had represented the islanders as cannibals (a charge which now appears to have been without any foundation), and in the 'Asiatic Researches' of 1795, Lieutenant Colebrooke wrote of them: 'The Andaman Islands are inhabited by a race of men the least civilised perhaps in the world, being nearest a state of nature than any people we read of. They go quite naked; the women wearing at times a kind of tassel or fringe round the middle, which is intended merely for ornament, as they do not betray any signs of bashfulness when seen without it. . . . The men are cunning, crafty, and revengeful.' Other authorities to the same effect are quoted by Lubbock ('Prehistoric Times,' 4th ed. p. 451). 'The Andaman Islanders appear to be entirely without any sense of shame, and many of their habits are like those of beasts. . . . Marriage only lasts till the child is born and weaned, when, according to Lieutenant St. John, as quoted by Sir E. Belcher, the man and woman generally separate, each seeking a new partner.'

The Andaman Islands are now the principal convict station of the Government of India, and the islanders have been brought under British administration. A most interesting account of them, founded on actual observation, has been published by a British Indian public officer, Mr. E. H. Man ('Journal of the Anthropological Institute,' XII. i. 69, and ii. 13). One of the points most dwelt on in this account is the modesty of the women. They will not renew their leaf aprons even in one another's presence. Another is the married women's chastity. In the esteem in which they (the islanders) hold their virtues (modesty and morality) they compare favourably with that existing in certain ranks among civilised races.' Marriage is a well-defined institution. 'Marriages never take place till both parties have attained maturity, the bridegroom from eighteen to twenty-two, the bride from sixteen to twenty.' Bachelors and spinsters are placed at the opposite ends of the large common dwelling-house, and the married couples in the middle. Paternity is thoroughly recognised; the father is generally present at the child's birth. There is no example of a cross-breed in the islands.

There is a government by chiefs whose authority is reflected on their wives. 'A chief's wife enjoys many privileges, especially if she be a mother, and, in virtue of her husband's rank, she rules over all the young unmarried women, and the married ones not senior to herself.' 'There is much mutual affection in social relations,' says Mr. Man. 'Children are taught to be generous and self-denying. The duty of showing respect and hospitality to friends and visitors is impressed on them from their earliest years. Every care and consideration is paid to all classes, to the very young, the weak, the aged, and the helpless.'

My impression is that there is no subject on which it is harder to obtain trustworthy information than the relations of the sexes in communities very unlike that to which the inquirer belongs. The statements made to him are apt to be affected by two very powerful feelings—the sense of shame and the sense of the ludicrous—and he himself nearly always sees the facts stated in a wrong perspective. Almost innumerable delusions are current in England as to the social condition, in regard to this subject, of a country so near to us in situation and civilisation as France.

CHAPTER VIII.

EAST EUROPEAN HOUSE COMMUNITIES.

NOTHING would be of higher value to scientific archæology than any addition to our opportunities of observing societies of Aryan race still remaining in a condition of barbarism. The practices of savage men, lying altogether beyond the circle of the greater races, have been carefully observed and compared of late years, and some generalisations of much ingenuity and interest have been founded on them; but the relation of these practices to the beginnings of our own civilisation is far from satisfactorily settled at present. The early usages of the now civilised societies can be partially recovered from their records, their traditions, and above all from their law; but it is just where these sources of evidence can least be depended upon, where history runs into poetry, tradition into legend, and definite law into dimly seen custom, that the connection between barbarous Aryan usage and savage non-Aryan practice has to be established, if it really exists. What we most require is the actual examination by trained observers of some barbarous or semi-barbarous community, whose Aryan pedigree is reasonably pure.

India has made contributions of great importance to the study of early institutions, and I hope to show, before the close of this paper, that among the most important are the most recent. Many portions of the social and family life of the high-caste Hindu unquestionably answer to stages of social development through which the earliest civilised communities of the West may just be seen passing in the twilight of their history. But there are some serious drawbacks on the value of Indian social facts, and some considerable limitations of their impressiveness. A great deal of the very ancient usage discoverable in India is non-Aryan. There are no doubt abundant remains of true Aryan barbarism, but it is not always easy to distinguish this from barbarism which is non-Aryan, and that which is really Aryan has been transformed to an unknown extent. A religion which has lost its affinity for the religions of the West is constantly penetrating and modifying it, and the newer influences of the English dominion are working upon it with ever-increasing effect. Whatever, too, be the value of Indian observations, they do not certainly at present produce the impression which might be expected on the European historical scholars who are busy with the rudiments of Western society. There is an evident distrust of illustrations of social growth taken from the usage of a people so remote as the Hindus, and so long parted from the sister-communities of the Aryan group.

No field of investigation seems to me to promise so much to the student of primitive social antiquity as that opened to us by the obvious thinning of the superficial crust of Mahommedan institutions spread over so great a part of the once civilised world. In all the countries now or lately under Mussulman dominion, strange and deeply interesting forms of ancient social organisation from time to time come into the light, like buried cities from volcanic ashes or lava. This remark must be confined to communities conquered by the Mahommedans and made tributary to them, but not converted to the Mahommedan faith. For the purposes of the scientific archæologist, a group of men converted to Mahommedanism becomes practically worthless, because from the moment of its conversion it lives under a civil law which is also a religious law, and which can only be explained at present as a religious law. The portions of ancient usage which in the present state of these inquiries yield most to the student of early institutions are those which, in modern phraseology, we should call the law of Inheritance and the law of Marriage. But a society which has adopted the Mahommedan law of inheritance has come under a system of rules of succession which may possibly embody some Arabian customs, but which on the whole can only be accounted for as consisting of strict deductions from the letter of texts assumed to be sacred. This system of rules arranges the heirs in classes unlike those known to modified or unmodified Aryan custom, and it is moreover a system of extremely definite division into fractional shares. On the other hand, under rudimentary Aryan usage, it is not the individual, but rather a collective group of kinsmen, which profits by the death of a relative ; and it is exactly because the composition of this group, and the mode of devolution within it, probably reflect some more ancient method of collective enjoyment during life, that rules of intestate succession have nowadays so profound an interest. Again, the barbarous Aryan, still following Aryan custom, is not only generally monogamous, but (to use Mr. McLennan's extremely convenient term) exogamous. He has a most extensive Table of Prohibited Degrees. The Mussulman, however, is not only polygamous but endogamous : that is, his law permits comparatively near relatives to intermarry. It has been noticed by good observers in India, that the comparative liberty of intermarriage permitted by Mahommedanism is part of the secret of its success as a proselytising religion. It offers a bribe to the convert in relieving him from the undoubtedly vexatious restraints of the Brahmanical law of marriage.

But where communities subject to Mussulman rule have never been converted to the Mussulman faith, the effect of the dominant Mahommedanism is to fix and stereotype their barbarism, where they are barbarous. A large number of them are socially organised in groups held together by the reality or the fiction of common blood; they possibly may never have attained to a higher organisation than this, or—what is more probable—the Mahommedan conquest may have not merely arrested their civilisation, but may have actually forced some of them to retrace part of the path by which they had ascended from a primitive barbarous condition. When, however, these groups are once organised on the well-known model of an association of kinsmen or tribesmen, there is much in Mahommedan government which tends to tighten the bonds by which they are held together. The members of Christian societies are most reluctant to enter the Mahommedan Courts, and thus they are led to value the domestic tribunals, which all naturally organised brotherhoods include. Again, community of life based upon consanguinity always implies common liability to the discharge of legal demands; and thus the fiscal exactions of the Mussulman ruler give a strong motive to the kinsfolk to keep the burden of taxation resting on as many shoulders as possible. The advantage of maintaining the liability of groups rather than the liability of individuals is also felt by the Mahommedan Governments themselves, and they are thus led to favour the integrity of these natural bodies, just as the French seigneurs are stated in mediæval law-books to have favoured the existence of communities of villeins living *au même pot.* The natural processes of dissolution to which such groups are subject are also much retarded by the indirect influence of Mahommedan power. The chief dissolving forces acting on primitive communities are war and commerce. One tears them to pieces and scatters the fragments abroad, the other disintegrates them, by creating inequalities of wealth ; and nothing is harder (as will be seen presently) than for the rich and poor brethren to dwell together in unity. But a Mahommedan Government on the whole keeps the peace, and both by its acts of commission and by its sins of omission, by its irregular taxation, and by its failure to provide modes of easy communication and a pure and regular administration of justice, it retards or puts a stop to the accumulation of capital.

The closer examination of the Turkish provinces in Europe which many causes have recently made practicable has already recovered for us a nearly perfect example of one of the oldest institutions of the Aryan race—probably, with the exception of the Family, the very oldest. The House Community is not peculiar to the territories and dependencies of the

Turkish Empire, since it is found among all the South Slavonian populations, but it occurs in greatest completeness wherever men of the South Slavonian stock are now or have been lately under Mussulman government, or where, like the Montenegrins, they have had their whole history determined by incessant struggles with Mussulman power. The importance of these House Communities is easily understood by the student of what I may perhaps venture to call social and political embryology. They are a living form, very near to us and constantly brought nearer, of institutions rather hinted at than revealed in the most ancient records of a singularly large number of civilised nations. The Roman law, which supplies the only sure route by which the mind can travel back without a check from civilisation to barbarism, shows us society organised in separate families, each ruled by the Paterfamilias, its despotic chief. But it also exhibits vestiges of institutions not wholly forgotten, of certain associations of related families which still had something in common and might once have had a common life. There are some marks of these associations on law, and some more on religion, but practically in Roman legal history they are dead institutions. Next above the Family, there were vestiges among the Romans of a group which had no special collective name, the Agnati, or Agnatic Kindred, the collective body of kinsmen related exclusively through male descents, who either were, or might have been, under the paternal power of the same ancestor. Again, above the Agnatic Kindred, there was yet another and a more extensive group, of which the origin was lost in antiquity, but which was believed by the Romans themselves to have been formed as the Agnati were formed—that is, by descent through males alone from a real common male ancestor. This was the Gens. Nothing can be more interesting than to find alive in usage these groups which, as bodies having a corporate existence, are dead in Roman law. There can be no reasonable doubt that the House Community of the South Slavonians corresponds to one or other of the larger Roman groups, to the Hellenic γένος, the Celtic Sept, the Teutonic Kin. It answers still more closely to the Joint Family of the Hindus, which is itself a living though an extremely perishable institution. In what way it is related to certain associations of savage families, like it and yet very unlike it, upon which our attention has been fixed by the deeply interesting researches of Mr. McLennan (in his 'Primitive Marriage') and of Mr. Lewis Morgan (in his 'Ancient Society'), is a point upon which it may one day be possible to have a clearer opinion when the savage and the Aryan group have been fully studied in the life.[1]

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[1] See Note A to this chapter, on 'The Gens.'

Fifteen or twenty years ago the institutions of the Slavonians had begun to attract attention, and it was becoming extremely probable that they would prove to be the bridge connecting two portions of the earth and mankind long arbitrarily separated, the East and the West. The Russian Village Communities were seen to be the Indian Village Communities, if anything in a more archaic condition than the eastern cultivating group. In the Village Community, however, the bond of common origin and kinship, though still recognised in language and to some extent in feeling, is feeble and indistinct ; the model has been too often simulated by fictions for the sense of reality to be very strong. The related families no longer hold their land as an indistinguishable common fund—they have portioned it out, at most they redistribute it periodically ; sometimes even that stage has been passed. They are on the high road to modern landed proprietorship. But in the Joint Family of the Hindus the agnatic group of the Romans absolutely survives—or rather, but for the English law and English courts, it would survive. Here there is a real, thoroughly ascertained common ancestor, a genuine consanguinity, a common fund of property, a common dwelling. And the Joint Family of the Hindus, save that it now lasts for fewer generations, is point for point the House Community of the South Slavonians. The distribution of these ancient groups in the countries in which they are found is well worth remarking. The North Slavonians or Russians have the Village Community. The House Community belongs specially to the South Slavonians, the Croatians, Dalmatians, Montenegrins, Servians, and the now Slavonised Bulgarians. On the other hand, in India, the Joint Family and the Village Community are often found side by side, sometimes indeed bound together by complex common relations. Even there, however, it has been observed that, where joint families are abundant, the village organisation is weak and village communities are rare; and this is notably the case in Lower Bengal.

The House Community then is an extension of the Family: an association of several and even of many related families, living together substantially in a common dwelling or group of dwellings, following a common occupation, and governed by a common chief. The law or custom which regulates these institutions has lately been subjected to a close examination by an eminent man of learning, whose writings are still obscured by that unfortunate veil of language which hides Slavonian literature from this generation of Englishmen. The name of Professor Bogišić is connected with several places, with which, now of all times, we should least expect to have literary associations. He is a native of

Ragusa ; his last work is published by the Academy of Sciences at Agram ; he is a professor in the University of Odessa ; and he has codified the laws of Montenegro. The results of his investigations are only known to me through some German translations of passages in them, and through a summary of a portion of them by M. Fédor Demelic. Nothing, in my opinion, can exceed their instructiveness. They show us the very way in which, amid a primitive tribal society of Aryan race, the personal relations and ideas of men become modified when the small groups of which they form part are absorbed in larger assemblages, both the large and the small group being respectively tied together by community of blood. They thus disclose to us Political Power in the embryo : the Chief growing out of the head of the household, the State taking its first beginnings from the Family. They are entitled to take their place by the side of some recent Indian investigations which I will describe presently, as new materials of the highest value for a theory of the condition of the higher races of men in a state of barbarism.

It would appear that in all the South Slavonian countries Natural Families, as they are called, are found intermixed with the House Communities. By a ‘natural family’ is meant a group consisting of the descendants of an ancestor still alive, while a house community is (almost invariably) an association of families all descended from a common ancestor deceased. These natural families have not been as carefully examined as could be wished; they had not the strangeness of the house community in the eyes of the observers, who again show no signs of being acquainted with the controversy which has arisen on the point whether the larger or the smaller group is the more ancient, and better entitled to be considered the cell out of which human society sprang. I have, however, no doubt myself, from a variety of indications, that these families are, as a rule, despotically governed by the eldest ascendant. Not only the legal writers, but all travellers in South Slavonian lands, have noticed the extraordinary respect of the South Slavonians for old age. 'Without reverence for old men there is no salvation,' is a Servian proverb. 'A father,' says another Slavonian maxim, 'is like an earthly god to his son.' A less reverent adage runs, 'The reason why the devil knows so much is that he is so extremely old.' Still more convincing evidence is furnished by the fact observed by Professor Bogišić, that the South Slavonians, like the Romans, maintain a clear distinction between Agnatic and Cognatic relationship, which they term respectively kinship through the great blood and kinship through the little. Thus a group of men, connected with a common ancestor through male descents (natural or adoptive) exclusively, are kinsmen of the great blood; they are kinsmen of the little blood when they include also the descendants of female relatives. Now the recognition of agnatic relationship is good evidence that patriarchal power either exists or has once existed in a community; there may have once been paternal power where there is no agnation, but where there is agnation there must almost certainly have been paternal power.[2] The play, then, of relation between the Family and the House Community is exactly what we observe in India between the Family and the Joint Family. The family, when it does not dissolve by the swarming off of the children, expands into the house community; the community (though not so often as in India) breaks up into separate natural families. The process, for all the evidence before us, may have gone on from time immemorial.

The House Communities, which are found intermixed with the natural families, and which are constantly springing out of them, are as far as possible from being patriarchal despotisms; and they illustrate very clearly that diminution of paternal power which, as I have frequently insisted, shows itself when families, instead of dissolving at the death of an ancestor, hold together and take the first steps towards becoming a nation. The community at first sight is rather democratically than despotically governed, and it would in fact depend on the point of view from which the observer regarded it, whether he considered its government to be democratic, aristocratic, or monarchical. Every member of the body has an absolute right to be maintained, housed, and clothed out of the common fund. Every daughter of the associated families has a right to a marriage portion when she marries; every son has a right to a provision for his wife when he introduces her into the community. Every male of the brotherhood has a voice in its government. The assembly of kinsmen (the Skuptchina) meets every day as a rule, generally in the evening after work is over, under a tree in the neighbourhood of the common dwelling. All the affairs of the community are there discussed, and every man may theoretically mingle in the deliberations. Nevertheless, as a rule, it is the old men who debate; the authority which, as I before said, the South Slavonians assign to old age, makes the opinion of the old far more weighty than their individual voice; and in very large communities it would seem that it is generally the mature heads of families who attend the assembly. All this is exactly in harmony with what we know of the beginnings of Aristocracy throughout the Aryan world; but it should always be remembered that if the association were habitually militant, both the old men and the youths would probably fall into the background, and the authority in council would belong to the mature warrior who is foremost in arms.

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[2] I learn from correspondence with Professor Bogišić that the Power of the Father is stronger among the Russians than among the South Slavonians, and that among the latter it is stronger near the coast than it is inland. He has heard a young man say to his father, 'We are not here in the coast country, where fathers are everything and sons nothing.' In some parts of these countries sons cease to be subject to the father's power when they marry; but in this case marriage seems to imply severance from the paternal domicil, which is probably the earliest form of the process which the Romans called Emancipation.

Under another aspect, however, the government of the community is monarchical, and at all times its most important member is the House-Chief, the Domatchin. He alone represents the association in its dealings with other persons and members. The administration of all its affairs is in his hands: he allots the daily tasks; he presides at the common meals and distributes the food; he reprimands for faults or delinquencies; he is invariably addressed in language of the greatest respect; all rise on his entrance; no one covers his head or smokes in his presence; no amusement or ceremony commences till he appears or has announced that he will stay away. The council of the brotherhood does not review his acts, but it is expected that he will submit important cases to it, and its jurisdiction is called into exercise when new principles of administration have to be settled. The women of the community, it should be stated, are not directly under his authority; there is a house-mother who appoints their work, but she is, whenever it is possible, the wife of the house-chief, and is always subordinate to him.

The mode of appointing the House-Chief is in the highest degree interesting, and throws a strong light on a number of problems which meet us in the ancient history of the kingly office. The student of political embryology is familiar with the seeming contradictions between the facts just seen in the dim light which surrounds the beginnings of royal power. Sometimes the office of the Chief or King seems wholly elective, and its bestowal entirely determined by personal fitness ; sometimes it appears to be hereditary, but then it is quite uncertain whether it will descend to the brother or to the eldest son of the last sovereign ; in general the office is confined to men, yet here and there a woman in certain eventualities becomes lady or queen. Very ingenious explanations of these phenomena have lately been suggested. But the system of choosing the South Slavonian house-chief, while it exhibits exactly the same apparent uncertainty, shows at the same time that it arises from a very natural and intelligible cause—from the conflict between a sentiment and a necessity, between a very powerful feeling of respect for blood and a very clear sense of the pressure of the facts of life. First, the chief is elected by the collective brotherhood ; but the brotherhood rarely, if ever, fails to choose a member of the family connected with the common ancestor through descents of primogeniture. Its inclination would be to choose the eldest son of the last chief, but its veneration for age, and its sense of the value of experience as a means of success in the struggle for existence, lead it constantly to elect the next brother of the last administrator. By its strong appreciation of the importance of individual capacity it is led occasionally to put a woman at its head—who in this case is quite distinct from the house-mother, governing the women under the house-chief. The practice of electing a woman to the chieftainship appears to be less common than was supposed by the travellers who first observed the house communities, and it is not impossible that they failed to discriminate between the two shapes which the authority of the house-mother takes. But undoubtedly a woman is occasionally placed not only over the women, but over the men of the community, and wherever this occurs it is for reasons of her especial fitness to undertake the administration. The leading case mentioned by my authorities is where a considerable part of the revenue of a community was derived from a boarding-school for girls kept by the ladies belonging to it. Of course, no such reason as this for choosing a woman to rule could have had effect in primæval ages, or even at the dawn of history. The explanation of the early female successions to sovereignties and lordships no doubt is that the circumstances of the time allowed unchecked play to respect for the claims of blood; the men being exhausted, a woman was taken rather than a new strain of blood introduced. Nevertheless, these Slavonian phenomena suggest that, even in the primitive militant communities, eminent capacity in a woman might overweigh the disadvantages of sex, and that every now and then a Deborah or an Artemisia might rule the tribe as the house-mother rules the house community. Sometimes, it should be noted, the woman chosen is the widow of the last chief, who during his lifetime shared his authority, more particularly over the females of the household.

It appears to be a general rule of all these house communities that the capital stock or fund necessary for carrying on the business of the association is incapable of alienation. The nature of this alienable property varies a good deal; thus, with a community of vine-growers, the fermenting vats cannot be parted with; and it is the usage with associations of distillers to apply the same principle to the apparatus of distillation. But the great majority of the house communities are purely agricultural, and it is remarkable that the property which the custom of these communities makes inalienable corresponds very closely to the *res mancipi* of the older Roman law: that is to say, it consists of land and plough oxen. It has often been suggested—by myself among others

—that the objects placed by the Romans in the highest class of property were the commodities of first importance to an agricultural people ; and though we only know the Roman *res mancipi* as alienable under certain circumstances, the very complexity of the formalities required for alienation furnishes a hint that they once constituted the inalienable capital stock of the ancient Latin cultivating communities. But these recently observed facts from Eastern Europe suggest some new ideas, not only concerning the *res mancipi* but also and more particularly concerning that other and technically inferior class of property, the *res nec mancipi*, in which the Romans placed all the objects of enjoyment not included in the higher division of things. I myself conjectured, some years ago, that the articles not enumerated among the favoured objects seem to have been placed on a lower standing, 'because the knowledge of their value was posterior to the epoch at which the catalogue of superior property was settled. They were at first unknown, rare, limited in their uses, or else regarded as mere appendages to the privileged objects.' I still think this description of the *res nec mancipi* probably true of some stages of primitive society, and if the last words, 'appendages to the privileged objects,' be understood of the products as distinguished from the instruments of labour, I think they are also true of the social stage of the ancient world to which the Slavonian house communities most nearly correspond. It may be supposed that the earliest cultivating communities were barely self-sufficing; that they never parted with their instruments of tillage, and consumed all the fruits which the earth yielded to their labour. But as production became more abundant, as intervals of peace became less rare, as common markets were gradually established, economical forces would begin to operate with greater activity, and the *res nec mancipi* would obtain their first step in dignity as commodities exchangeable at a profit. All the surplus produce of the domain would be *res nec mancipi*, and, if not stored, would be bartered or sold. We can see from the Slavonian examples that some things included in the higher class might locally and occasionally be dealt with as belonging to the lower. The Roman *res mancipi*—land, slaves, horses, and oxen—would no doubt answer to the commodities which primitive agriculturists would almost everywhere regard as properly inalienable, but it is likely that Roman authority generalised the usage beyond its primitive area. A community of cattle-breeders would regard oxen as eminently exchangeable, and even an agricultural community may originally have confined the inalienability to the oxen which served as beasts of plough.

Peculium—a few head of oxen kept apart—was the name which the Romans gave to the permissive separate property allowed to son or slave. No principle was more persistent in Roman law than the subjection of the *peculium* to the authority of the paterfamilias or the master, should he choose to exercise it ; and the independent holding of the *peculium*, even by sons, was secured only by very late legislation. These Slavonian usages and the experience of the Slavonian communities give us reason to believe that the separate holding of property by the members of the brotherhood had a much more important influence in other societies than it had in one so sternly tenacious of a central principle as the Roman. The *peculium* seems to be always an actively dissolving force. It had this effect to some extent with the Romans, but with the Hindus it is the great cause of the dissolution of the joint families, and it seems to be equally destructive in the South Slavonian countries. When the house community is in its primitive and natural state, there is no *peculium* : there is none in Montenegro ; the dominant notion there is that, as the community is liable for the delinquencies of its members, it is entitled to receive all the produce of their labour ; and thus the fundamental rule of these communities, as of the Hindu joint families, is that a member working or trading at a distance from the seat of the brotherhood ought to account to it for his profits. But, as in India, all sorts of exceptions to this rule tend to grow up ; the most ancient and most widely accepted appearing to be, that property acquired by extremely dangerous adventure belongs independently to the adventurer. Thus, even in Montenegro, spoil of war is retained by the taker, and on the Adriatic coast the profits of distant maritime trade have from time immemorial been reserved to seafaring members of these brotherhoods. But the reluctance to surrender individual gains is a sentiment observed to be gaining in force everywhere, and, in connection with some other causes which I will mention afterwards, it universally tends to bring about the dissolution of the communities. Doubtless it was always among the most potent of the influences which began to transform the old world of consanguinity into the new world of economical relation.

The situation of women in the primitive groups of barbarous Aryans, is a topic which calls for much ampler and more minute discussion than can be given to it within my present limits. I will, however, briefly note one or two points among a considerable number which deserve separate treatment. (*a*) The house community of the South Slavonians, like the joint family of the Hindus, is primarily a community of males. The daughters are entitled to be married and portioned at its expense, and steps are taken to bring about their marriage before any son is married, but they have no right to any share of the capital stock on the rare occasions on which it is divided. (*b*) At present a certain liberty is allowed to them in the choice of a husband, but in the South Slavonian lands, as elsewhere, there are many vestiges of infant marriage. Down to quite recently, a Christian girl in Eastern Europe was irrevocably betrothed, though not married, in early childhood. (*c*) The wives of the confederated kinsmen brought into the community from outside have their marriage portion reserved to them as separate property or *peculium*, and a certain amount of money or goods (which many customs enable us to trace to the ancient institution of the 'morning gift') is held by them independently, not only of the collective group, but of their husbands. (*d*) In some of the house communities both this property and the marriage portion, both the *parapherna* and the *dos*, descend, like the Hindu Stridhan, by a peculiar line of succession to female inheritresses.

Like all branches of the Aryan race which remain in a condition still savouring of barbarism, but which have not adopted Mahommedan institutions, the South Slavonians bring their wives into the groups in which they are socially organised from a considerable distance outside. To this 'exogamy,' in the primitive militant state, they no doubt owed hardihood, physical vigour, and relative success in the struggle for existence; and at the present moment the common residence of so many persons of both sexes in the same household may be said to be only possible through their belief that any union of kinsmen and kinswomen would be incestuous. The South Slavonian Table of Prohibited Degrees is extremely wide. Every marriage which requires an ecclesiastical dispensation is regarded as disreputable; and, though the rule of ecclesiastical jurisprudence on prohibitions against intermarriage is tolerably followed, it is rendered excessively stringent by a peculiar method of counting the degrees. The distaste of the South Slavonians for suing in the Turkish Courts is largely caused by these ideas about intermarriage. Mahommedanism, as I before stated, is an 'endogamous' religion; it derives from its Semitic origin a rather limited Table of Prohibited Degrees; and thus a Turkish Court, though not professing to apply the Mahommedan rules, is constantly found admitting the legitimacy of children born of a marriage which the Christian Slavonians consider to be incestuous. Nobody can wonder at the repugnance of the Slavonians towards entering the Turkish Courts as litigants in cases where their women are concerned; but undoubtedly some of the principles which they accuse the Turkish judges of applying have more in common with our ideas than with theirs. Besides this complaint on the subject of intermarriage and legitimacy, the Slavonians are said by Professor Bogišić to resent the application of rules, Mahommedan in origin, to the inheritance of property by women. Under Mahommedan law, wherever sons and daughters take together, the daughters take half a son's share. Now the custom of the house communities excludes the daughters from any share when the common fund is divided, either at a death or otherwise. The deeply rooted and very ancient notion is that an unmarried daughter is only entitled to maintenance, and that a married daughter is finally and exclusively provided for by her marriage portion.

I have here noticed the practices called by Mr. McLennan 'exogamy' and 'endogamy' chiefly for the purpose of calling attention to the manifold and surprising fictions by which an inherited sense of the advantage of exogamy and of the disadvantage of close intermarriage is reconciled with the doctrine of the Eastern Church on the point. It is to be remarked that every variety of fiction heretofore observed among ancient societies held together by the assumption of common descent is found among the Christian Slavonians of Eastern Europe. Kinship is in the first place created artificially by Adoption, and in this case the adopted member of a family or house community is assimilated to the naturally born kinsman for all purposes indiscriminately. Entire subfamilies are engrafted on the house communities, individuals are taken into the subfamilies; and occasionally aged men, strangers in blood to the brotherhood, are admitted to a place among the elders of the joint household from whom labour is no longer exacted or expected. It seems to be a universal condition of the Slavonian adoption, that the person or family received into the house community shall be virtually without natural ties through the death or emigration of the natural kindred : a precaution which may remind us of the extreme care bestowed by the Roman College of Pontiffs, that the ceremonial observances of two families should not be confounded through a precipitate adoption. But besides the artificial adoptive relation, which stands for all purposes on the same level as natural connection of blood, there are numerous other fictitious relationships which exist chiefly for the purpose of preventing intermarriage. Several of these correspond to the fictitious ties which are shown by their ancient law to have been common among the Celtic Irish at the opposite end of Europe. Thus the relation of foster-parent to foster-child creates relations between their respective families which operate as a bar to intermarriage. Gossipred, spiritual parentage, the connection between sponsor and godchild, has the same effects among the South Slavonians which it once had over the whole Christian world. But there are in Eastern Europe forms of fictitious consanguinity hitherto unknown to the study of ancient institutions. The groomsman at a wedding comes under a set of rules which restrict intermarriage with the family of the bride to just the same effect as if he had been naturally the brother of the bridegroom. Confraternity, fictitious brotherhood —which is an artificial creation of fraternity, just as adoption is an artificial creation of parentage—retains probably in these Slavonian lands the shape which it wore in more westerly countries before it became the central principle of so many orders of knighthood; it is solemnised with a special ritual of the Slavo-Greek Church, and it is the source of a special Table of Prohibited Degrees. But perhaps the most singular illustration of the tendency of kinship to extend itself artificially under the empire of primitive ideas is to be found in certain Slavonic forms of gossipred or spiritual relationship. Here we have fiction upon fiction. The relation of sponsor to godchild imitates consanguinity; the Slavonian gossipred imitates the ecclesiastical gossipred. A man whose life is endangered by the enmity of another may make him an offer of what is called gossipred by misfortune. If the enemy refuses, he may be lawfully killed even by treachery. If he accepts, he becomes connected with his former adversary by a kind of spiritual relationship, and is in fact compelled to become sponsor to his next-born child. These peculiar artificial relations in the wilder Slavonian countries, and particularly in Montenegro, are found extremely useful in staunching blood-feuds. When a momentary reconciliation has been effected by friends or neighbours between Montenegrin Capulets and Montagues, it is common to give it stability by insisting that the heads of the contending houses shall become spiritually related to one another. The expedient is well known as the gossipred of reconciliation. The truth is that mere sentiment has not among these people solidity enough to form a binding tie between man and man. If it is to bear the ordinary strains of barbarous life, it must have a core of fictitious consanguinity.

I stated that the House Communities and Natural Families which make up the bulk of South Slavonian society are constantly running into one another; the community dissolving into a mere collection of families, the family expanding into the community. But both these groups occasionally dissolve in other ways, and some instruction may be obtained from observing the mode of dissolution. When a natural family breaks up, room is made, I need scarcely say, for the operation of the body of rules which we call Inheritance; and in those portions of the South Slavonian countries which are under Codes, as, for example, those which belong to the Austro-Hungarian Monarchy, the law settles the distribution of the family fund, and to some extent the personal relations of the kinsmen to one another. But where, as in Turkey, the local usage is left to its unchecked operation, one of the systems of succession commonly followed has a great deal of interest for us. Each son of the family, as he grows up and marries, leaves his father's household, taking with him the share of its possessions which under developed law would have devolved upon him at his father's death, and he goes elsewhere, often into a far country, to seek a new fortune. Perhaps there are few things which at first sight seem to have a more distant connection with one another than the customs of Primogeniture and Borough English and the Scriptural parable of the Prodigal Son. Yet precisely the same group of usages lies at the root of the institution and gives its point to the story. The division of the family property does not wait for the father's death. The son who wishes to leave the family home takes his share with him, and goes abroad to add to it or waste it. The son who remains at home continues under *patria potestas*, serving his father and never transgressing his commandments, but entitled at his death to the entire remnant of his property. 'Son, thou art ever with me, and all that I have is thine,' says the father in the parable, and this is precisely the foundation of the rule of ancient law. Which indeed shall be the home-staying son is a point on which there has been much diversity of usage. In the Scriptural example, it is the eldest son. Primogeniture, as we know it in our law, had rather a political than a civil origin, and comes from the authority of the feudal lord and probably from that of the tribal chief; but here and there on the Continent there are traces of it as a civil institution, and in such cases the succession of the eldest son does not exclude provision for the younger sons by what are called appanages. The evidence of ancient law and usage would, however, seem to show that it was usually the youngest son who remained at home with his father to serve him through life and succeed to his remaining property at his death; and thus the Slavonian usage accurately reflects the earliest stage of the English custom of Borough English.[3]

If we take a survey of the Slavonian usages as a whole we shall have little doubt that the natural development of the House Community would be into the Village Community. It has almost universally assumed this form in the Russian territories. The number of families included in the brotherhood has now become much larger. Professor Bogišić says that the house communities rarely include more than sixty individuals, which is greatly less than the number of persons making up the community of an Indian or Russian village. But with the extensions have come a variety of changes. The land, instead of being cultivated absolutely in common, is divided between the component families, the lots shifting among them periodically, or perhaps vesting in them as their property, subject to a power in the collective body of villagers to veto its sale. The tie of brotherhood has also become greatly weakened ; all sorts of fictions have enfeebled it, and so many strangers in blood have been admitted, that the tradition of a common origin is dim or lost. The common house of the House Communities tends constantly in the South Slavonian countries to become a group of dwellings, but the Village Community is essentially an assemblage of separate houses, each ruled by its own chief. The reason why the Southern communities have held compactly together, while the Northern communities have relaxed and extended themselves, can in the main only be guessed at ; but we can hardly be very wrong in conjecturing that the nearness or remoteness of Mahommedan power had a great deal to do with it. This Mahommedan power is doubtless the secret of the survival of both forms of the community ; but the South Slavonian communities, closer to the headquarters of Ottoman dominion, needed a stronger and more compact organisation to protect their possessions, institutions, and faith, while the Russian populations were only occasionally and intermittently scourged by the invasions of their Tartar suzerain. In comparatively recent times, the house communities have chiefly had to complain of irregular exactions from their Turkish masters ; on the whole the Turkish Government has encouraged them, just as the French feudal lords seem to have encouraged the house communities lately discovered in France, on account of their relative opulence, and on account of the better security thus afforded for the punctual payment of taxes and dues.

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[3] See Elton, *Origins of English History*, pp. 184 *et seq.* Mr. Elton's work is rich in new information on this subject.

Assuming that the decay or dissolution of the House Communities is matter of regret, there is no doubt as to the quarter in which they find their most dangerous foes. It is not barbarism which they have to dread, but civilisation. All the recent observers of the South Slavonian communities lament the influence of modern codes in undermining or destroying them. The same destructive effects are attributed to the older Austrian code which is in force on the Eastern shores of the Adriatic, and to the newer laws introduced into the Slavonic lands dependent on the Hungarian Crown. I can well believe these statements, as I have frequently observed the unintended disintegration of the Indian joint families by the less violent operation of Anglo-Indian law. Legal maxims apparently the most innocent prove to be fraught with peril. Long since I pointed out that the widespread principle of modern law, '*Nemo in communione potest invitus detineri*,' 'No one can be kept in co-ownership against his will,' was irreconcilable with archaic usage; and Professor Bogišić dwells on the destructiveness of a well-known doctrine of the eminent German jurist, Puchta, that, where a law and an usage are at conflict, the same rules of interpretation should be applied in harmonising them which are employed to reconcile two contradictory provisions of law. It is very justly objected that laws theoretically proceed from the same legislator, who is assumed to have contradicted himself by accident, whereas law and usage constantly spring from historically different sources. The tendency of modern courts administering modern law is in short to look upon the house communities as bodies of voluntary partners, and to draw from it the inference that they may dissolve at the will either of any one associate or at all events of a majority.

These purely legal causes of dissolution are further strengthened by economical causes, which now constantly tend, as probably they have always tended, to sap all associations founded on consanguinity. The adventurous and energetic member of the brotherhood is always rebelling against its natural communism. He goes abroad and makes his fortune, and strenuously resists the demand of his relatives to bring it into the common account. Or perhaps he thinks that his share of the common stock would be more profitably employed by him as capital in a mercantile venture. In either case he becomes a dissatisfied member or a declared enemy of the brotherhood. And just where this kind of discontent is commonest, the facilities for indulging it are greatest. For the Slavonian countries which have Codes are of course the best governed Slavonian countries. There wealth is more easily obtained, and its preservation is easier; and there also the courts of justice are open to arguments which, if successful, are fatal to the cohesion of the house communities, because they appeal to principles born amid a civilisation to which the ancient natural associations of mankind were foreign or unknown. The first French Revolution has sometimes been charged with having left its chief mark on law in an excessive preference for partitions and for sharply drawn lines of division between proprietary rights; and it has been thought to have thus led by reaction to the modern theories of Socialism and Communism. But this preference is as characteristic of the Roman law as of the French Code; and in fact the Austrian Code, which has proved so fatal to the house communities, was begun before the Revolution by the Emperor Joseph II. I have no doubt that the peculiarity is less attributable to the discontents of the eighteenth century than to its growing wealth, and to the increasing activity of all economical forces.

The legal history of the North Slavonians seems likely to furnish us with a mass of information on the mode in which feudal lordships and the kinds of property dependent upon them grew out of the older social and proprietary organisations. But the South Slavonian House Community I believe to be older in order of development than the Village Community of the Russians, and hence it helps little to throw light on the most difficult of all historico-legal problems, the rise of feudal ownership. One significant statement is however made, that on the Austrian military frontier, where house communities were planted on lands held by a tenure of military service, the authority of the house-chief assumed more and more of a despotic character, and he could sometimes be hardly distinguished from a sole owner of the originally common domain.

These new Slavonian materials for a theory of the growth of Aryan society, valuable as they are, have one drawback ; they are the phenomena of tribal groups which for a long period of time have not been fully exposed to the stern process of natural selection. The Mahommedan governments above them have on the whole prevented their engaging in war or brigandage ; if they have fought, it has generally been against a common Mussulman foe. Fortunately, it has just now become possible to place by their side another set of novel facts, gleaned by an Indian observer from an Aryan society which has hardly ceased to be violently disturbed. These results, obtained by actual inspection of Rajputana, the home of the Rajput clans, are in fact related to the results of Professor Bogišić, as are the phenomena of barbarous and militant to the phenomena of barbarous but peaceful communities. Excellent observers have never been wanting in the Indian services, but it is the exceptional distinction of Sir Alfred Lyall, the gentleman to whom I am referring, that he understands the nature of the problems suggested by the most recent archæological research; and thus his appointment to a Commissionership in the wild province of Berar in Central India, and to the high office of Agent of the Governor-General in Rajputana, may be said to have begun a new epoch in the investigation of Indian Aryan usage in the stage most conveniently called barbarous. For what follows I am indebted to his writings, now collected in a volume called 'Asiatic Studies;' and more particularly to chapter vii., on the 'Formation of Clans and Castes,' and chapter viii., on 'The Rajput States of India.'

The social system of Rajputana is pure clanship; society is held together entirely by the tie of blood; nor is there any serious question that its kernel consists of Aryans, still barbarous, indeed, but of the purest breed. Though the pretension is resisted by the Brahmans, the Rajputs claim to represent the ancient regal and military caste of the Sanscrit religious literature, the Kchatryas. The circumstance that villages of Rajputs, often of a very humble station, are occasionally found over most of Northern India, admits of a simple explanation. Originally a conquering and military race, the Rajputs seem to have been first weakened by the attacks of indigenous tribes of humbler origin, and finally overwhelmed by Mahommedan conquest. Some of them bowed their necks to the yoke, and remained as peaceful cultivators in the plains of India; but others migrated into the great natural fastness now called from them Rajputana, where they founded societies all of one type. The valour of the Rajputs and the strength of their country long preserved them from being reduced into mere subjects of the Mogul, but perhaps their greatest influence has been derived from their intense pride in blood and birth. No princesses were so much coveted for wives by the emperors at Agra and Delhi as the daughters of Oodeypore and Jeypore; and alliance with them is still regarded by Hindus as above all price. The lowest point, however, which their fortunes reached was just before the British conquest of Northern India; no states owe more to the success of the British arms, and none are governed by princes more loyal to the British Crown.

These Rajput clans have long been recognised as in the highest degree interesting and worthy of the most careful observation. As I said before, good observers of social phenomena have been plentiful in India, but unfortunately, in the case of Rajputana, the interpretation of the phenomena has been much vitiated by a false historical theory. One of the most careful, learned, and valuable books ever written about India is Tod's 'Rajasthan,' but the author laboured under the erroneous impression that the most ancient type of society is that which we call feudal. Society in Rajputana or Rajasthan is not, however, feudal; it is præ-feudal or tribal; at the utmost, some of the signs of inchoate feudalism may be detected in it; and thus Colonel Tod's constant references to the well-known incidents of feudal tenure are extremely misleading. Sir Alfred Lyall has now shown that the true instructiveness of the country comes from its illustrating, not the mechanism of feudalism, but the method of tribal formation and development, the stages by which Aryan consanguinity grew to its perfect form.

It results from the inquiries and observations of Sir Alfred Lyall that in Rajputana, the land of the clans, and in the wilder Indian countries under Rajput clannish influence, two sets of forces or agencies are constantly at work, disintegrating agencies and organising agencies, forces of dispersion and forces of consolidation. All of these have seemingly been in operation from time immemorial, though some of them are losing their activity under British supervision or administration, and may ultimately die out altogether.

The dispersing forces are mainly war, pestilence, and famine. War, in the countries under British authority, takes now the form of brigandage, but pestilence and famine have at most been brought under some degree of control. 'It is well known,' says Lyall, 'from history, and on a small scale from experience of the present day, how famines, wide desolating invasions, pestilences, and all great social catastrophes, shatter to pieces the framework of Oriental societies, and disperse the fragments abroad, like seeds, to take root elsewhere.' There are clans apparently of real common descent which are also local clans, still occupying the seats of which they first took possession, or to which they emigrated as a body ; but many of these circles of kinsmen have been and still are broken up, and all of them or portions of them have been driven away to any place in which they can find refuge or subsistence. The Fuidhir, or broken man, is as common in Central India as he was in ancient Ireland. Yet it is not to be supposed that the original kinship is broken in idea as it is in fact. Each fugitive or emigrant retains the memory of the stock from which he sprang, partly from pride of blood, partly because he carries with him his usages of intermarriage, and would think it incest to marry a son or daughter within the prohibited degree. Thus, wherever he settles, he tends to become a new root for a Rajput γένος, *gens*, or sept, and the centre of a new circle of affinity. The effect is to produce a structure of society extremely like that which meets us in the beginnings of classical history. As will be seen presently, the fugitive is at once placed under a new order of relations with the neighbouring families in contact with whom he actually lives, but he is not released from connection with his natural kith and kin, just as a Roman or Athenian noble, settled at any point of the Ager Romanus or the Attic territory, would still count himself a member of his patrician house or eupatrid tribe.

It seems to me highly probable that these forces of dispersion acted on the ancient tribal organisation of more northerly branches of the Aryan race. But, if the conjecture may be permitted, I should say that they operated on a smaller scale. Wars were probably as bloody and frequent among the forerunners of the Romans and Athenians as among the Rajputs, but pestilence and famine have always been more destructive in tropical regions. Thus the fugitive was driven to a smaller distance. It is, however, no more incredible that an Athenian family settled in a particular locality of Attica should have been at some time expelled from its original tribal home, than that, in later times, a citizen of Athens should deem himself a hopeless exile at Corinth or Megara. In order to understand the most ancient condition of human society, all distances must be reduced, and we must look at mankind, so to speak, through the wrong end of the historical telescope.

It has still to be considered how it comes that an emigrant or fugitive Rajput, besides retaining his connection with his natural tribe of descent, enters into new relations with the families among whom he has settled. Here, in order to understand some of the most interesting of Sir Alfred Lyall's observations, we must attend to his distinction between pure and impure tribes.

A pure tribe is a tribe of descent, living together generally in the same local seat, and having a real genealogy. Such tribes are still founded in the same way in which they have always been founded. 'Whereas,' says Sir Alfred Lyall, 'in modern times great men of action found dynasties or noble families, which transmit the founder's name down along the chain of direct lineage, so in prehistoric ages men of the same calibre founded clans or septs, in which not only the founder's actual kinsfolk who followed his fortunes were enrolled, but all who had any share in his enterprises.' All such clans in Rajputana claim to run up to a single ancestor; and probably the pedigree even of those which pretend to the most prodigious antiquity is to a great extent genuine. For literature in Rajputana still retains that which we may believe to have been its most ancient form—

in the songs of the hereditary bard, celebrating the exploits, and above all the antiquity, of the family of which he is the honoured retainer. These bardic genealogies may probably be trusted up to a certain point; but even the least imaginary of them have been doubtless to some extent affected by fictions. Not only are the kinsfolk of the eponymous heroic founder mentioned, but all who followed him in the original adventure come in time to be reckoned as kinsmen. The pedigree is lengthened sometimes through unintentional error, clansmen who lived at the same time being counted as belonging to successive generations, and sometimes through deliberate or poetical exaggeration. The main trunk of the family tree is carried beyond the true founder, and finds its root in a god or among the luminaries of heaven. The proudest princely houses of Rajputana pretend to a descent from the sun and the moon, but a real human founder, an adventurous and successful warrior, can generally be detected. As Sir Alfred Lyall says, the best type of the founder of a pure clan is David, the son of Jesse, with his hard-fighting kinsmen, the sons of Zeruiah.

The most original result of Sir Alfred Lyall's investigations is his determination of the manner in which impure clans are formed. In a work published some years ago, I said that the conclusion suggested by the evidence then accessible was, '*not* that all early societies were formed by descent from the same ancestor, but that all of them which had any permanence or solidity *either* were so descended, *or* assumed that they were. An indefinite number of causes may have shattered the primitive groups, but wherever their ingredients recombined, it was on the model or principle of an association of kindred.'[4] An impure tribe or clan is not a body of kinsmen, but a body formed on the model or principle of an association of kinsmen. Sir Alfred Lyall has been fortunate enough to see these associations in the actual course of formation.

> Not only (he says) do robber tribes receive bands of recruits during periods of confusion, but there goes on a steady enlistment of individuals or families whom a variety of incidents or offences, public opinion or private feuds, drives out of the pale of settled life and beyond their orthodox circles. Upon this dissolute collection of masterless men the idea of kinship begins to operate afresh, and to rearrange them systematically in groups. Each new immigrant becomes one of a new tribe, but he adheres nevertheless so far to his origin and his custom as to insist on setting up a separate circle under the name of his lost clan, caste, family, or lands. Where an Englishman, settling perforce in Botany Bay, or spontaneously in Western America, kept up familiar local associations by naming his homestead after the county town in his old country, a Rajput, driven into the jungles, tries to perpetuate the more primitive recollection of race.

In this way new clans are constantly forming, under the presidency or hegemony of some successful family, and always with a mechanism of social arrangements closely copied from the internal relations of the principal group. The leading family will often consist of real Rajput emigrants, and in this case the whole of the new clan will have a faint sort of claim to be recognised as of Rajput origin, but the proud Rajputs of the ancient stock will only allow the pretension after very strict examination of the emigrant's pedigree. Sometimes it will happen that the chief who becomes the kernel of the new association is a mere captain of robbers, but it is generally found that in a generation or two his descendants will lay claim on curiously slender grounds to a Rajput extraction. A great many of the stories current in India about the loves of gods, and about princes or princesses stolen in their infancy, have really been devised to give colour to fictitious pedigrees; and this is the humble and commonplace beginning of many popular tales for which the Comparative Mythologists have claimed a more august origin. At the same time it is not to be supposed that all associations of men are successful in consolidating themselves into a clan.

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[4] *Ancient Law*, p. 31.

> A vast number of rudimentary clans are cut off or disqualified early in their formation by one or other of the innumerable calamities which beset primitive mankind, . . . the blood is corrupted, the genealogy is lost, the brethren are scattered abroad to new habits of life and unauthorised means of subsistence, to strange gods and maimed rites. But the broken groups re-form again like a fissiparous species. And as the great majority of these circles fade away in outline, or break up again into atoms before they can consolidate, there goes on a constant decomposition and

reproduction of groups at various stages, whence we get at the extraordinary multitude of circles of affinity . . . . which make up the miscellany of Indian society.

The chief secret of a stage of social evolution which is now utterly strange to us, is the condition of mind which I recently dwelt upon in describing ancient Irish society.[5] In the mental state which has survived in Central India, ideas are few, and additions to them scanty and slow. The problem which must have obtruded itself on men ever since their existence became the same thing as thought, the question why they had relations and sympathies with one another, is solved by an appeal to kinship. The fundamental assumption is, that all men not united with you in blood are your enemies or your slaves. To associate on terms of equality or friendship with a man who is not in some sense your brother is an unnatural condition ; if it be prolonged your neighbour grows into your brother. The modern reason for holding together in social union, that you and your neighbours belong to the same territorial sovereignty, is new and even monstrous in Rajputana and the countries under its influence. The British Government of India indeed recognises nothing but territorial sovereignty as the principle on which men are grouped together. The Maharana of Oodeypore, the Maharajahs of Jeypore and Jodhpore, are only known to the Calcutta

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[5] *Early History of Institutions*, Lecture 8.

Foreign Office as princes ruling over certain defined territories; but to all the native dwellers in Central India they are the semi-sacred chiefs of clans of the purest blood, deriving their patriarchal authority from heroic or divine forefathers. Sir Alfred Lyall gives some striking illustrations of the unpopularity of territorial sovereignty in Central India It is condoned in the case of the British Government, which delivered the Rajput clans from oppression, and probably saved them from extinction; but the subordination of pure Rajputs to low-caste Mahrattas or Mussulman apostates is resented as a crying injustice. We have all heard what Camerons and Macdonalds thought of being required to obey the Earl of Argyll, not because he was McCallum More, but because he had obtained a grant of feudal superiority from the Scottish king; but the Indian princes who rule over many Rajputs, Scindiah the Slipper-bearer and Holkar the Shepherd, are in their eyes less like chiefs of the Campbells than like upstarts sprung from the enslaved tribes who hewed wood and drew water for the great clan of the Western Highlands.

Among the more special causes of the process of tribal aggregation is the convenience of the arrangement to men who regard a more or less strict exogamy as sanctified by usage and religion. The pure Rajput has a prodigious table of prohibited degrees; but he is also surrounded by a circle within which he must marry. He must marry within his caste; he may not marry within his special clan. He has great difficulty in finding wives for his sons; he has still greater difficulty in finding husbands for his daughters. These vexatious rules of intermarriage are extremely mischievous to the pure clans, which are greatly weakened by the necessity for their observance, and are even said to be slowly dying out for lack of reproduction. But to the emigrant Rajput it is a positive advantage to be grouped in the same vague and extensive tribal bond with a number of families or septs whom he has not yet learned to regard as literally of the same blood with himself. He must marry, to borrow the Roman expressions, within his tribe; he may not marry within his *gens*. When the tribal union is just definite enough to serve as a substitute for caste, and when the various septs included in it are separate from one another—strung together, to use Sir Alfred Lyall's language, like rings on a curtain rod—the chances for the fertility of the clan are at the highest point, and give it a manifest advantage in the struggle for existence. At the outset, being perhaps little more than a horde of brigands, it may suffer from the scarcity of women within its circle; and at this stage all sorts of fictions are adopted to bring stolen girls within the tribal outline. At the other end of its development it will again suffer, because all the families or septs in the clan will now have come to be looked upon as akin to one another, and debarred from intermarriage. The intermediate stage of which I have been speaking is the most convenient of all.

But the most interesting result of these inquiries into the origin of impure clans is the determination of the principal fiction at work in their formation. It is one which has not by any means died out of the Western world, into which it was reintroduced by the revival of feudal and municipal aristocracy. The odour of vulgarity which it has now contracted makes it, perhaps, hard to understand its primitive importance, since it is neither more nor less than the fiction of a better family and a longer pedigree than one is really entitled to. What was once a force in the West has now become a foible; but in the East, among societies held together by kinship, it is still a force. Lyall's explanation of the problem with which we started is that, to quote his words, 'the different stocks congregate by force of circumstances, and tend to form a tribe and clans within a tribe, under the name and within the influence of the most successful groups.' The Indian mode of bringing the fiction as near as possible to a fact is, I should observe, materially different from any contrivance resorted to in this part of the world. It by no means consists in bold assertion, or getting a false entry introduced into a *nobiliaire* or peerage. In India a man's rank is measured, not by his wealth or power, not even by what is written about him, but by the number of things he may or may not do. A family on its promotion practises the most rigid abstinence from particular kinds of food and drink, abstains from all sorts of actions, is scrupulously careful about the marriage of its daughters, and goes daily through a punctilious ceremony of domestic worship. It engages a Brahman chaplain and a Brahman cook; and thus the entire Brahman priesthood of the country will perhaps be led to countenance its pretensions to high-caste extraction. Once taken under the shelter of Brahmanism, the fiction can hardly be distinguished from a fact.

The effect of these remarkable observations is to suggest a theory of the origin and growth of society among the higher races of mankind, which differs in some material respects from any hitherto propounded, though it is much more consistent with some of the current theories than with others. Sir Alfred Lyall follows Mr. Carlyle in saying that 'the perplexed jungle of primitive society springs from many roots; but the Hero is the taproot from which in a great degree all the rest are nourished and grown.' A mighty man of valour, with his kinsmen and retainers, founds a clan. Through the very fact of success, this clan is saved from the first from the calamities which arise from an unequal balance of the sexes—the real secret, as I believe, of those unhappy usages which have been saddled by recent theories upon all mankind. It becomes therefore a pure clan, having a genuine pedigree, in which certainty of paternal descent from the famous founder or founders is assumed from the outset. It may also be exogamous, either through the number of female captives which always formed part of its spoil, or simply because the practice of taking its wives from a distance, however this came about, increased its physical vigour and caused it to prevail in the struggle for existence. The formation of such a clan might be a fact by itself, and, so far as we have gone, it would be a plausible objection that the wholesale formation of such clans was highly improbable. But now we see how such a clan acts on the masses of men around it. It starts a process of ferment and crystallisation by which all tribes and assemblages in its neighbourhood or within its influence group themselves in circles as nearly as possible adjusted to the heroic model. The original communities of men may have taken all sorts of forms : in the present state of these inquiries it is impossible not to suspect that no statements can be hazarded on the subject which are at once safe and very general. But evidence of many different kinds suggests that this 'miscellany' of primitive society was brought into shape by the influence of dominant types, acting on the faculty of imitation which must have always belonged to mankind. The communi ties which were destined to civilisation seem to have experienced an attraction which drew them towards one exemplar, the pure clan, generally exogamous among the Aryans, generally endogamous among the Semites, but always believing in purity of paternal descent, and always looking back to some god or hero as the first of the race.

NOTES AND ILLUSTRATIONS.

NOTE A.

THE GENS.

THE passage in the text respecting the ancient groups more or less answering to the still extant House Community has been somewhat altered since it was first printed in the 'Nineteenth Century.'

It will be seen that, in the present state of these inquiries, I do not accept the account of the origin of the Gens given either by Mr. McLennan or by Mr. Morgan as universally true. I do not, for example, venture to dissent from the view which the Romans themselves took of the history of this peculiar group as known to themselves. What this view was may be inferred from a passage in Varro ('De Linguâ Latinâ,' viii. 4) which has been often quoted. The grammarian observes that there is a certain 'agnation' and 'gentility' among words. All the cases of the noun 'Æmilius' are descended from the nominative, just as all the members of the Gens Æmilia, all the Æmilii, are descended from a single original Æmilius. The Romans, therefore, regarded 'gentility' as a kinship among men not essentially different from 'agnation.' The Agnati were a group of actual or adoptive descendants, through males, from a known and remembered ancestor; the Gentiles were a similar group of descendants from an ancestor long since forgotten. It is true that some learned Romans seem to have perceived or thought that this Gentile relationship was to some extent fictitious; but, on the whole, they figured it to themselves as a form of kinship arising from descent, through males, from a common male ancestor. For reasons given in Chapter VII., I think that the Roman theory of the origin of the Roman Gens was at least probable. I see no reason to doubt that, though some of the gentes may have been fictitious, and others partially fictitious, there was a real core of agnatic consanguinity in most of them from the very first. The probable character of the fictions which clustered round this core may be gathered from the latter part of the preceding chapter. As Sir Alfred Lyall's description of the mode in which groups simulating true tribal groups are formed is now printed in his 'Asiatic Studies,' I might have omitted my abridgment of it; but I retain it, because nothing seems to me to have more affected primitive society, and yet to have been more neglected by those who have theorised on it, than the imitative faculty which man has always possessed and which Sir Alfred Lyall has witnessed in actual employment by barbarous men.

On superficial consideration, we are apt to think that man's mimetic faculty confines itself to matters of taste and personal habit. But, in truth, there is no successful, or conspicuous, or simply fashionable model which men, in the various stages of their progress, will not endeavour to imitate. The habit of political imitation, which has always been strong, still survives. 'Make us a King to judge us, *like all the nations*,' said the Israelites to Samuel (1 Sam. viii. 5). 'Give us a Constitution to regulate our liberty, like that of one particular nation,' is the corresponding modern and Western demand. If anybody is inclined to think that the process of copying models by entire societies is extinct, he should look at the way in which the British Constitution, which was once regarded by men more civilised than the English as an eccentric political oddity, has spread over nearly all Europe in less than seventy years. What Sir Alfred Lyall has shown from his own observations is the activity of this process of imiration in barbarous stages of society. Barbarous men will copy any successful or fashionable social type—a Tribe, a Sept, a Gens, a Village Community, the rules of 'exogamy' or 'endogamy,' the practice of infanticide or suttee. The agency by which the imitation is carried out is Fiction, sometimes of the most audacious kind, and through it an old order is constantly giving place to a new, and even broken hordes, mere miscellanies of men, are transmuted into definite social forms, which afterwards might seem as if they had all sprung together from roots deep in the Past.

The important lesson is that in sociological investigation it is never possible to discover more than the way in which the Type has been formed. If an institution is once successful, it extends itself through the imitative faculty, which is stronger in barbarous than in civilised man. It follows from this that no universal theory, attempting to account for all social forms by supposing an evolution from within, can possibly be true. A person perfectly ignorant of European history might suppose that the British Constitution and the Belgian Constitution, which are extremely like one another, were produced by analogous courses of development; yet the Belgian Constitution is really the copy of a copy, and the true growth of constitutionalism can only be traced in the history of the English Constitution.

The eminent writers I have named, if I have rightly understood them, are of opinion that the Roman Gens and all similar bodies are derived, without exception, from older groups still to be observed among savages. Among the so-called aborigines of Australia, among the North and South American Indians, and elsewhere, but always among slightly advanced communities, there are found groups of men and women tracing kinship exclusively through the female parent, and not through the male. Wherever they have any tradition of human ancestry, they trace their parentage, according to Mr. Morgan, to a common ancestress, and not to an ancestor. Their most distinct characteristics are that they mark their bodies with some common mark or 'totem,' and that the members of the same group never intermarry; and thus, as I have said in the text, they resemble a Sex rather than any other combination of human beings now familiar to us. On the other hand, among several barbarous or semi-barbarous communities we can still observe, and in the ancient history of several civilised or semi-civilised societies we can still detect, another class of groups having a close resemblance to the Roman Gens. They attribute their origin to a single common male ancestor, and they trace kinship through the male parent, real or adoptive, alone. The members of such groups much more frequently intermarry than do the members of the savage group; but occasionally they will not intermarry, at all events as a matter of theory. Such is the Hindu theory with reference to kinsmen and kinswomen belonging to the same Gotra, and there is some faint evidence of a similar feeling once existing in the Roman Gens. Even among savages, examples of groups tracing relationship through males are found intermingled with groups acknowledging female descents only; and Mr. Morgan insists that the first groups are merely the last in a transmuted shape, and that the transformation occurred everywhere, in the societies now civilised as well as in those still savage or barbarous. He several times thus describes the process : 'Descent in the Gens was changed from the female to the male line,' giving the name Gens indifferently to both groups.

Whatever the facts may have been, the language of Mr. Morgan seems to me to be open to much objection. One of these two groups did not really succeed the other, but the two co-existed from all time, and were always distinct from one another. We must be careful, in theorising on these subjects, not to confound mental operations with substantive realities. The 'Agnatic' Gentile groups, consisting of all the descendants, through males, of a common male ancestor, began to exist in every association of men and women which held together for more than a single generation. They existed because they existed in nature. Similarly the group consisting of the descendants, through women, of a single ancestress still survives, and its outline may still be marked out, if it be worth anybody's while to trace it. What was new at a certain stage of the history of all or of a portion of the human race must have occurred, not in connection with the Gens, but in connection with the Family. There was always one male parent of each child born, but prevalent habits prevented his being individualised in the mind. At some point of time, some change of surrounding facts enabled paternity, which had always existed, to be mentally contemplated ; and further, as a consequence of its recognition, enabled the kinship flowing from common paternity to be mentally contemplated also. As to the new facts which led to this recognition, all that, in my opinion, can be said of them is that they must have been such as again to give free play to an overmastering emotional force. Believing, as I do, that when Paternity reappeared, it reappeared in association with Power and Protection, I require no explanation of the fact that the kinship then recognised was kinship through male descents only.

Mr. Morgan's application of the same name to the group mentally formed by attending solely to female descents and to the group constituted by looking only at male descents, seems to me unfortunate, because it tends to put out of sight the essential differences between the two. It is hard to see how the savage group can be self-existing, or indeed anything but an organisation for matrimonial purposes spread over a larger tribal community. The men born of the women belonging to it are themselves members of it, but the sons of these men leave it because they belong to the same group as their mothers. But the other group, formed by male descents from males, retains uninterruptedly the flower of its masculine strength, and this strength is constantly reproducing itself. Hence it tends to be a self-existent militant body. The famous exploit of the Fabian Gens at Rome, when they collectively attacked Veii, and were all but extirpated, is thus in itself perfectly credible. No doubt it is said that Australian savages will sometimes travel great distances to join in the quarrels of men having the same 'totem;' but these contests between people who have hardly any interests in common can be scarcely more than faction-fights between men wearing different colours. At the same time, I admit that further information of the precise way in which these peculiar organisations affect the practical life of the communities subject to them is greatly needed; and I regret that Mr. Morgan's death prevented his communicating to me the result of some investigations on the subject which he had promised to make. As to the South Slavonian communities, the actual origin of many of them has been recorded or is otherwise known. With the limitations mentioned in the text, they are composed of the descendants, through males, of a common male ancestor.

I have said above that workers in the new field of investigation opened by the life and usages of savage societies seem to me to be under some temptation to take mental operations for substantive realities. Mr. Morgan, it is well known, considered that the savage habit of grouping relatives in large classes, without reference to degree—of grouping, for instance, a man's father and his uncles together and calling them all his fathers, or forming his brothers and male cousins in one class and calling them all his brothers—is a relic of a state of society in which the relations of the sexes were very unlike those to which we are accustomed. Earnest, and indeed bitter, controversies have already arisen on this theory of Classificatory Relationship, and ingenious efforts are from time to time made to identify and recover the lost forms of marriage. May I suggest that it is at least worthy of consideration whether all or part of the explanation may not lie in an imperfection of mental grasp on the part of savages ? The reader of Dr. Macfarlane's remarkable 'Analysis of Relationships of Consanguinity and Affinity' ('Journal of Anthropological Institute,' xii. 1) will require no further proof that the comprehension of a large body of complex relationships demands a prodigious mental effort, even now requiring for its success the aid of a special notation. Some communities have surmounted a part of the difficulty by giving separate names to the nearer relationships, which is what Mr. Morgan calls the Descriptive System; but is there not ground for a suspicion that the savage classification is after all nothing more than a rude and incomplete attempt at the mental contemplation of a tolerably numerous tribal body? Is it more than a conception of complex relationship, reached by looking only at generations and by eliminating the idea of grade or degree? The rough view of a community as consisting of generations is common enough. It appears alike in the Hindu sacerdotal distribution of life into that of the Student, the Householder, and the Ascetic, and in the fine Greek song of the militant Dorians which makes the men boast that they are warriors, the children that they will be warriors some day, and the old men that they were warriors once

CHAPTER IX.

THE DECAY OF FEUDAL PROPERTY IN FRANCE AND ENGLAND.

CONSIDERING the immense space which the first French Revolution filled in the eyes of the generation which immediately succeeded it, it is surprising at first sight that the search after authentic materials for an opinion concerning its causes, course, and character was for a while but slackly prosecuted. A virtually inexhaustible store of such materials existed in the *cahiers* —the statements of grievances which, according to the ancient practice of the French States-General, were sent up from every administrative subdivision of France to the body which became the first Constituent Assembly. Yet it is only in comparatively recent days that this and other similar stores of historical wealth have been critically examined. The story runs (I do not know whether it has found its way into print) that a well-known German historian once expressed his amazement at having pointed out to him in Paris some dusty bundles of papers, with the remark that they had lain undisturbed since they were deposited in the Archives on the reconstruction, after the close of the Reign of Terror, of the gloomily famous Committees of Public Salvation and General Security. 'But you have classical histories of the Revolution.' he said ; 'have not these documents been examined by their writers?' 'No,' was the reply, 'that is the dust of 1794.'

There is, however, some account to be given of this neglect, especially as regards the *cahiers.* One cause of it has undoubtedly been that preference for general explanations of phenomena which has always been a heavy drawback on French genius ; and the general explanations of the first French Revolution current in France are a multitude. But another, and probably the most powerful, cause is the nearness of the Revolution itself. De Tocqueville, who first dug deep into the *cahiers*, and showed what great results might be obtained by thoroughly exploring that mine, has left the striking remark that no foreigner can properly appreciate the state of sentiment in one section of French society, where there is scarcely a single family in which the guillotining of a parent or a near relative is not a recollection or a fresh tradition ; and one of the fruits of this condition of feeling is a strong reluctance to connect the France of the Revolution with the France of the Monarchy. Another, and a much larger, portion of the nation traces its political and social rights to the period during which all this blood was shed; and hence arises a manifest disposition to regard the Revolution as a historical catastrophe, terrible but inevitable, and to look on the society which succeeded it as no more closely related to that which preceded it than is the vegetation which has grown on the sides of Vesuvius after an eruption to the vegetation which the lava destroyed. Between unwillingness to find the parentage of the Revolution in the old *régime* before it, and unwillingness to have its crimes placed in full light, the first condition of scientific history, the critical examination of its sources was too much and too long overlooked. But of late, and mainly owing to the influence of that invaluable work on the relations between Old and New France, on which De Tocqueville was still engaged at his death, the business of correcting preconceived opinions by the aid of authentic historical materials has been rapidly proceeding. Two interesting books, one by M. Chassin ('Le Génie de la Révolution'), and the other by M. Doniol ('La Révolution Française et la Féodalité'), are among the first-fruits of renewed examination of the *cahiers*; and in the three volumes of his 'Origins of Contemporary France,' which M. Taine has lately published, he has given us instalments of a work which, apart from its great literary merits, is not unworthy to be compared with De Tocqueville's fragment in the originality and carefulness of the research of which it gives proof. M. Doniol states that great quantities of the original *cahiers* are to be found in the French Archives ; but, though some of them were separately printed in 1789, I am not acquainted with any collection of them fuller than that published, many years ago, by Prudhomme and Laurent de Mézières.

But although the diligent prosecution of these inquiries is comparatively recent, it has already led to considerable results. Some new facts have been discovered, some already known have been brought into clearer light, and several errors have been detected. Among the passages in the Revolution hitherto obscure which may now be better understood, one or two deserve especial remark. The hostility of the cultivating peasantry to the territorial nobility in all provinces of France except Brittany and Anjou, has generally been recognised, not merely as one of the causes of the Revolution, but as the chief cause of the rapidity with which it gathered head and of the comparative stability which it manifested. The provincial cities and towns were slowly drawn into the movement through the action of Jacobin clubs, gradually established in them, and taking their instructions from the central body in Paris, which no doubt from the first was a furnace of revolutionary agitation. But the peasantry, always excepting those of the western provinces, were from the very beginning enthusiasts for the destruction of the ancient institutions, and so they remained until they gained their objects. This universal hatred of the peasants had for one of its effects a condition of the country which, no doubt, has often perplexed the reader of the ordinary histories. After a while France became hermetically closed, and escape from the guillotine became almost impossible. Some writers, in explaining this, have attributed to Robespierre a special genius for police organisation; but the truth seems to be that the cultivating classes, who at first witnessed with pleasure the emigration of the nobility, constituted themselves a voluntary police as soon as they found that, by detaining the nobles in France, they would probably send them to the scaffold. This extremity of detestation is not sufficiently accounted for by assigning general reasons for it. The complicity of the peasants with the rulers of the Reign of Terror was undoubtedly connected with a wish to preserve certain advantages which they had obtained just at the very period when France became a republic; and similarly an earlier series of incidents, which testify to the same unqualified bitterness of feeling, are now shown to have had a special rather than a general cause. M. Taine has described in the subdivision of his work called 'L'Anarchie Spontanée' those terrible outbreaks of violence which occurred even as early as 1789, and which are sometimes designated collectively the 'burning of the châteaux.' What is now seen clearly, but had only been suspected before, is that the acts of the incendiaries had a distinct object.[1] The object in setting fire to a château was to burn the muniment-room; and the object of burning the muniment-room was to destroy the *titres* or title-deeds of the seigneur of the fief—as we should say, of the lord of the manor. All this would be hardly intelligible but for a fact, now established, which possibly requires a lawyer rather than an historian to appreciate it—the fact that the French nobility were everywhere engaged in never-ceasing litigation with the peasants. The majority of the French nobles, it should be understood, had little or no analogy to what we understand by a landed aristocracy. A certain number of them, relatively but a few, had great estates; but the largest part of them had little or no land let for rent to lessees or tenants-at-will. The multitude of petty noblemen and gentlemen—classes indistinguishable from one another in Old France—lived on the money produce of the small incidental services due, as we should say, from owners of land held in copyhold to the lord of the manor. Thus they had their *finances*, the 'fines' of our copyhold tenure, the dues payable to the lord by the peasant proprietor on death or on the sale of his land. They had also their monopolies, such as the obligation of the peasant to send his grain to the lord's mill for grinding, or his beast to the lord's market for sale. And they had a number of miscellaneous and nondescript sources of income, such as a sole right to have a dovecote stocked with pigeons, which fed on the peasants' corn. Now on the legal foundations of these privileges a strong controversy was proceeding among the French lawyers during the half-century preceding the Revolution. Some maintained the legal doctrine which had made great way in France at the period when feudalism was really strong—*Nulle terre sans seigneur*, 'No lord, no land.' On this principle, the presumption was always in favour of the liability to feudal dues, and the right to them could always be established by prescription. But another school, no doubt unconsciously influenced by the economical doctrines which had excited such interest among the educated classes in the latter part of the eighteenth century, contended that the lord must show his *titres*, and almost went the length of arguing that no feudal rights had a legal basis unless documentary evidence of title could be produced. The struggle between the competing principles produced an enormous amount of litigation, sometimes the lord encroaching on the strength of one view, sometimes the peasant on the strength of the other. In any event, the title-deeds of the lord had become of the greatest importance, and the advantage which the tenants gained by their destruction is obvious enough. At a later date it lost its value in the eyes of the peasantry, because more drastic remedies for their grievances had then been devised. The legislation of the Constituent Assembly swept away the greatest part of the feudal dues, and provided compensation for only a part of them. The Legislative or Second Assembly abolished the residue and withdrew the compensation. The Convention, or Third, found almost nothing to destroy, though it was passionately eager to fasten on a hated institution, and though the Revolutionary lawyers, who abounded in it, were the real authors of the legislative provisions, afterwards engrafted on the Code Napoléon, which for ever prevented the revival of feudal ownership in France. The transfer of property from one class to another through the abolition of the feudal dues was much more important than has been commonly supposed, and had much greater influence over the course of the Revolution. When in fact the Revolution ceased to be a social movement, it lost the greatest part of its aliment, and nothing remained for its authors except to tear one another to pieces.

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[1] See Taine, vol. i. of *La Révolution* (vol. ii. of the entire work), pp. 94 *et seq.* It will be observed in how many cases the attack on the château ends with the burning or pillage of the muniments. M. Taine observes that the anarchy was sure to spread. 'Remarquez,' he writes, 'que les chartriers et les titres féodaux sont encore intacts dans les trois quarts de France, que le paysan a besoin de les voir disparaître, et qu'il est toujours armé.'

While, however, the re-examination of the *cahiers* has placed beyond question the character of the grievances of the French peasantry, it has raised some new problems. Bitterly and strongly as these grievances were felt, were they of extraordinary proportions? Does the comparison of the relations between the French peasant and his lord with similar relations in other countries suggest that the small cultivator in France had exceptional and intolerable burdens to bear?

If I were to say that the first French Revolution took place because a great part of the soil of France was held on Copyhold Tenure, the statement would doubtless sound like a paradox. Those who have any practical knowledge of Copyhold, know it to be certainly an inconvenient form of landed property, but hold it probably to be, like all property, rather a privilege than a grievance. Those again who have paid any attention to its history, have possibly heard that Copyhold Tenure has descended from the precarious holdings of Bondmen or Slaves, a condition to which the greatest part of the Anglo-Saxon population is supposed to have been reduced after the alleged destruction of the ancient land-law of England and confiscation of its soil by William the Conqueror. The popular theory of the origin of Copyhold, or at all events the theory in which most lawyers are educated, is explicitly set forth in a tract on the 'Use of the Law,' commonly printed in collections of the writings of Lord Bacon (Spedding's edition, vol. vii. pp. 481 *et seq.*) The Conqueror is described as having 'got by conquest all the land of the realm (except Church lands and the lands of Kent) into his own hands in demesne, taking from every man all estate, tenure, property, and liberty of and in the same.' He then distributed the soil of England among his tenants *in capite*, 'reserving some retribution of rents or services or both to him and his heirs'; and 'by example and resemblance of the king's policy in these institutions of tenures, the great men and gentlemen of the realm did the like as near as they could.' Each of them, after reserving to himself the land in the immediate neighbourhood of his mansion-house, or manor, gave a certain portion of the 'uttermost parts' of his estate to some 'trusty servants, to find a horse for war and go with him when he went with the king to the wars, . . . which tenant is called a tenant of knight-service.' Smaller parcels of land he assigned to socage tenants, who were to plough part of the domain of the lord and bring home the harvest; and the remainder of this domain, 'which he kept to himself,' he cultivated by his bondmen, and 'he appointed them at the courts of his manor how they should hold it, making an entry of it into the roll of his court; yet still in the lord's power to take it away; and therefore they were called tenants-at-will by copy of court-roll, being in truth bondmen at the beginning; but, having attained freedom of their persons, they are now called copyholders, are and so privileged by the custom that the lord cannot put them out.' The writer adds that 'Manors being in this sort at first made, it grew out of reason that the lord of the manor should hold a court, which is no more than to assemble his tenants at times to be by him appointed. . . . This court is called a Court Baron; and herein a man may sue for any debt or trespass under forty shillings' value; and the freeholders are to judge of the cause upon the proofs produced on both sides.'

The tract on the 'Use of the Law' appears to be wrongly attributed to Lord Bacon, who has elsewhere shown that he had much sounder ideas than its writer of the true history of English institutions. The account, however, which it gives of the origin of Manors and of copyhold tenures is the one which, on the whole, has generally prevailed, and there is undoubtedly a good deal in the received authorities on copyhold to suggest it. Yet it is certainly not true, and perhaps the least drawback on it is that it is not true. For, by substituting for the truth a set of plausible fictions, it gives a wrong point to some instructive political lessons, and has besides the mischievous indirect effect of disguising from us that institutions, like forms of organic life, are subject to the great law of evolution.

The real facts are being gradually, though but slowly, established by very recent researches, but, so far as they can be stated in the space at our command, they are as follows:—

When Western Europe has settled down into comparative peace after the deadly strife which followed, first, the irruption of the Germanic races into the Roman provinces, and next, the disruption of the Carlovingian Empire, and when the feudal world has at last been constituted, it wears superficially a variety and irregularity of outline very unlike the apparent uniformity of the Roman Empire. But, on close inspection, all feudal society is seen to be a reproduction of a single typical form. This *unit* consists of a group of men settled on a definite space of land, and forming what we Englishman call a Manor, and what in France was called a Fief. The great misconception which runs through the account of this group which I took from the tract passing under Bacon's name, is as follows: the writer regards the Manor entirely as a mode of property, the manorial organisation as a mere proprietary arrangement. But the Manor or Fief, in its origin, was as much a political as a proprietary body, as nearly akin to a State as to an Estate. It retained even in its decay some of the characteristic and curiously persistent marks of Aryan political organisms. The Lord is the βασιλεύς, the rex, the king.[2] The free tenants are the γερουσία, the senate, the council. The villeins are the mass of the people; and below them are the true bondmen, the slaves, or thralls, or, in later legal language, the villeins *in gross*. The Signorial Court, the Court Baron, is the ancient village assembly, in which the administration of justice has now taken precedence of other public concerns, but in which those public concerns continue to be discussed, the lord presiding, the free tenants advising, the villeins attending without definite share or voice in the deliberations, like the crowd in the Homeric Agora. Those fines, dues, and monopolies which still annoy the English copyholder of our day, which went far to cause the first

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[2] In the series of papers, called 'Souvenirs d'Enfance,' which M. Renan is publishing in the *Revue des Deux Mondes*, he describes a class of territorial nobles who were found in Brittany, just before the Revolution, and who were quite distinct from the later nobility of royal creation. They had fallen into great poverty, but they received much consideration from the peasantry, who regarded them as the lay chiefs of the parishes of which the curés were the ecclesiastical heads. M. Renan mentions the remarkable fact that they touched for the king's evil. He says of one of them: 'On croyait que comme chef il était dépositaire de la force de son sang, qu'il possédait éminemment les dons de sa race, et qu'il pouvait avec sa salive et ses attouchements la relever quand elle était affaiblie. On était persuadé que pour opérer des guérisons de cette sorte il fallait un nombre énorme de quartiers de noblesse.'—*Revue des Deux Mondes*, March 15, 1876.

French Revolution, and which had to be cleared away by a timely stroke of statesmanship before Prussia could begin a struggle to relieve herself from French military despotism, were in their origin rather in the nature of taxes than in the nature of rent. They represent the ancient provision for the service of the little village commonwealth. Some of them may have sprung from the oppressions of the lord, and some from agreement with him ; but the greatest part had their origin in regulated force, the sovereignty of the little State.

The Lord, the Seigneur of France, is answerable for the conduct of the whole manorial group to its superiors and its neighbours. He is the manager or governor of the little society, with the advice of his free tenants. He is arbiter of its affairs in the signorial court. He is not the owner of all the land of the Manor ; but he generally owns some of it under the name of his domain. Much, however, of his revenues, and here and there the most important part of them, consists of the various dues payable to him from all classes of his tenants. Immediately under him are his freeholders, who render him military or other honourable service and do *suit*, which involves giving an opinion on the judicial or other matters arising in the Court Baron. But the greatest part of the land included in the Manor or Fief, in some cases much the largest part of it, is in the hands of the

Villeins. It was inevitable that the position of this stratum of the manorial community should be much misunderstood until the Comparative Method of Inquiry let in light upon it through observation of those more backward societies which have preserved to our days the life and social forms of the eleventh and twelfth centuries. The villeins owe to the lord all sorts of dues and services, personal labour, among others, on the lands which form his domain; they may not leave the Manor without his permission; no one of them can succeed to the land of another without his assent; and the legal theory even is that the movable property of the villein belongs to the lord. Yet it may confidently be laid down that, in the light of modern research, none of these disadvantages prove an absolutely servile status, and that all may be explained without reference to it.[3] Those who remember that, twenty-five years ago, the Russian serfs were popularly supposed in England to be as much slaves as the negroes of a Mississippi planter, but nevertheless are aware that under the great measure of 1861 the serfs, and not the lords, obtained much the largest part of the land, may be prepared for the assertion that the villeins of the middle ages were never in the strict sense of the word slaves, and never ceased to be in some sense landed proprietors.

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[3] Bracton most clearly explains that in the thirteenth century Villenage was a tenure and not a personal status. Either a freeman or a bondman might hold in villenage, but 'the tenement changes not the condition of a freeman any more than of a slave. For a freeman may hold in mere villenage, doing whatever service thereto belongs, and shall not the less be free since he does this in regard of his villenage and not in regard of his person.' I give the whole passage in Note A to this chapter.

To the typical form which I have described, Kingdoms were adjusted no less than Manors. The sovereign who became the most powerful in Europe, the King of France, was the lord of an exalted Manor. His free tenants were the Dukes of Normandy and Burgundy, the Counts of Toulouse and Champagne; his domain consisted of Paris and of the old Duchy of France. These continental institutions were reproduced in England, but, as has often been the case, *with a difference.* The great power of the early Anglo-Norman kings came from their allowing nobody to be absolutely interposed, like a Duke of Burgundy, between themselves and their subjects, and from their exacting fealty and therefore military service from all Englishmen (Freeman, 'Norman Conquest,' iv. 694). We can trace the Manorial group backwards to an earlier social form, a body of men democratically or rather aristocratically governed, in which the free tenants had as yet no lord, the village community.[4] We can also trace its gradual dissolution, until the forms of landed property were established with which we are all familiar. The exact point before us is, Why did the Manor in its decay produce such different results in England and France? Why did its transformation end in one country in a revolution which is an epoch of history? Why, in another, in a somewhat inconvenient form of landed property?

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[4] See Note A to this chapter, 'Village Communities and Manors.'

It is, in the first place, to be observed that the French peasant tenures of 1789 wear, *externally*, the strongest resemblance to the copyhold tenures which were found at the same date in England, and which indeed still survive, though their area is much limited. From my own researches, I should be inclined to doubt whether there is a single service of the French peasantry established by authentic evidence of which at least a trace cannot be discovered among the incidents of English copyholds. Arthur Young, who travelled just before and just after the outbreak of the Revolution, singles out certain French services for their especial grotesqueness, but feudal obligations nearly answering to several of them are mentioned by one or other of the witnesses examined by the Select Committee of the House of Commons on Copyholds which sat in 1850 and 1851. There are, no doubt, certain alleged incidents of the French tenure, implying an extreme degradation of the tenant, which do not appear to have ever had their counterparts in England, though they have been thought to be discoverable in the half-legendary history of Scotland; but the evidence of them has of late been considered to be extremely doubtful, and it certainly consists in some cases of a misapprehension of the meaning of old French juridical terms. On the whole, the correspondence of the French and English tenures is remarkably close; and nothing can exceed the surprise of M. Doniol—the first of his countrymen, I believe, who has become alive to this correspondence—that grievances which all his authorities declare to have brought about the great Revolution, are in England grievances of no political significance whatever. M. Doniol has imagined the following ingenious illustration of the disadvantages of the existing English copyhold tenure. He supposes a capitalist from the South of England beginning negotiations for the purchase of an estate in the North which has struck his fancy. His solicitor tells him that Manors abound in the Northern counties, and that the estate is mostly copyhold. On further inquiry, he is informed that the land is subject to arbitrary fines—the *finances* of old French law—and that a sum of money is therefore payable to the lord of the manor every time a copyholder dies or sells his land; and every time the lord dies, a similar sum must be paid to his successor. These *arbitrary* fines were once really arbitrary, but the King's Court long ago declared that (save in some very exceptional cases) they must be reasonable and must not exceed two years' value of the land. The consequence, however, is, that every time any one in a series of hereditary copyhold tenants (father, son, or grandson) dies, and every time a death occurs in a similar series of lords of the manor, two years' value of the land must be paid. Hence, M. Doniol's would-be purchaser is warned that it never can be worth his while to make improvements on his property, since they would only add to the standard of the fine leviable in these eventualities. He is further warned that, on his death, the most valuable piece of personal property he possesses will be liable to be seized by the lord under the name of a Heriot; and it is a fact that the Pitt Diamond and the famous picture of Rubens, the 'Chapeau de Paille,' which is the gem of the Peel Collection in the National Gallery, were barely saved from seizure as Heriots, and the most valuable racehorse of its time was actually seized, their owners happening to have some fragments of copyhold amid their estates. M. Doniol's solicitor then goes on to enumerate a number of smaller inconveniences of the tenure. One of them was in France one of the chief grievances of the peasantry. On being properly summoned the copyholder must supply a man to assist in reaping the lord's harvest. In old France, the peasant went himself, but in

England it merely comes to this, that the copyholder loses a day's work of one of his labourers; the lord, however, does not gain it, for the labourer sent to him does as little work as possible, and by the custom he is entitled to a dinner, which is worth more than the value of his labour at its best.

M. Doniol concludes by asking who in his senses could buy such a property. The incidents of copyhold which he specifies have a real existence and are very familiar to lawyers; many others equally singular in the eyes of a foreigner were described to the Select Committees of the House of Commons. Nevertheless, as M. Doniol himself admits, there is a certain fallacy in his account. For purposes of illustration, he assumes that all copyhold land is burdened everywhere with these onerous services. The truth is that, the picture is made up by uniting burdens spread over a great number of manors; and it may be asserted generally that in the southern counties of England manorial liabilities are seldom of much importance; and everywhere they have been extinguished in great quantities during the last five-and-twenty years by the proceedings of the Copyhold Commissioners.

The reasons which may ultimately lead to the compulsory enfranchisement on equitable terms of all English copyhold land are not at all likely to be the grievances of the copyholder. If he were to urge them, the answer openly or tacitly given would be that he is fortunate to have even an inconvenient kind of property, and that he is no more entitled to the public pity than a shareholder in a railway which pays intermittent dividends or none at all. Very probably he would be told that, whatever be the disadvantages of his property, they were doubtless allowed for in the price which he or his predecessors paid for it. The grounds on which enfranchisement will be enforced, if at all, will be, that copyhold tenure is an obstacle to agricultural improvement, on which it entails a direct penalty, and that it is a restraint on the productiveness of the soil. It is to be remarked, however, that this reasoning, or at least its cogency, is extremely modern. As recently as two centuries ago, an observer, not over-sensitive to other people's interests, described the grievances of copyholders in language curiously like that used of the wrongs of the French peasantry in the *cahiers* sent up to the French States-General. Roger North, in his delightful book, 'The Lives of the Norths,' tells us that the Lord Keeper Guilford qualified himself for practice at the bar by acting as the steward of various manors, and he quotes a good deal of the Lord Keeper's conversation on the subject of manorial rights. Guilford was in the habit of saying that he found himself the executioner of the cruelty of the Lords and Ladies of Manors upon poor men; that small tenements and pieces of land which had been men's inheritances for generations were devoured by fines; that it was wonderful how Parliament, which took away the royal tenures *in capite*, had never relieved the poorest landowners of the nation from extortion and oppression, and that the tenure ought to be abolished. Here is the very muttering of the volcano before the French revolutionary eruption; but there is this difference, that the class compassionated by North is a relatively small one as well as a poor one, for he goes on to observe on the large number of manors which had become altogether or partially extinct in England.

Now, if a hundred years ago, a great part of the class which, as a fact, consisted of agricultural labourers, and a considerable part of the class which, as a fact, consisted of tenant farmers, had been made up of copyholders standing to the Lord of the Manor in the relations which North describes, and if, under the law of the equal division of property these copyholders were constantly multiplying their numbers without severing themselves from the land, there would have been in this country a state of agrarian society very nearly resembling that of France. It must be allowed, I think, that if no similar convulsion had resulted from it, it would not have been for want of explosive material. As a matter of fact, nothing of the kind occurred, and the very suggestion of an

English Revolution caused by the oppression of copyhold tenants strikes every one as an absurdity. How then came the feudal edifice of which the outline had been extremely similar in England and France, to break into such different shapes? How came the same institution to become a grievance of the first order in one country, at most an inconvenience in the other? The answer to this question divides itself into many branches; some of them I could not follow without retracing much of the long and intricate history of English land-law, and without using much technical language, but the consideration of a few may not be out of place here.

One powerful cause of the difference lay in the strong distinction between the judicial organisation of France and of England. In both countries, a considerable part of the popular law, the law which affected the mass of the people in most of their concerns, had been once administered by the local courts, the Manor courts, and signorial courts, presided over theoretically by the lord, but practically by an expert deputy, the steward, attorney, or *bailli*. The French signorial court is extinct, and the only picture which remains is a caricature, in the play of Beaumarchais called the 'Mariage de Figaro.' Yet even the sketch of Beaumarchais is a sketch of a tribunal in its way powerful and important, and thus very unlike those Manor courts which, though still summoned in our day for the transaction of business, betray in every part of their proceeding their extreme decay. A century since, the English Manor court was very much what it now is; but the signorial court of France was a comparatively flourishing institution. The English country gentleman, who was lord of the manor, was administratively a person of great authority and influence; but his ancient jurisdiction was in extreme decrepitude, and the only judicial powers which he prized were probably those which he derived, as a Justice of the Peace, from the King. The French Seigneur, on the other hand, was administratively a cipher; as Tocqueville has pointed out, the agents of the centralised royal authority had usurped all serious administrative functions; but then the court of his signory, though it had lost much, had retained a good deal of its ancient authority and activity.

The different condition of the local jurisdictions in the two countries was certainly due to the different action upon them of courts outside and above them. In England the King's Courts at Westminster Hall constantly corrected the jurisdiction of the manorial courts, limiting the area of land subject to it, confining it rigorously to specific cases, and strictly prescribing the manner in which it should be exercised. The heads of the little manorial societies long struggled against what they deemed to be an usurpation. Too few manor rolls have been published; but in those which have been made accessible you frequently find the lord and the homage (that is, the assembly of free tenants) making rules against resort to the King's Court. Thus, if we turn to page 239 of Mr. Scrope's 'History of the Manor of Castle Combe,' we find an entry of a distress made on the goods of a copyholder for violating the constitutional rule (*communis ordinatio*) of the Manor, that 'no tenant is in any way or for any reason to implead, or procure the impleading of any other tenant, in any external court.' Not only did the King's Courts disregard all such rules, but they established the principle that the lord might be made to answer to the King for any excess of his authority, or of his customary privileges. Some of the best-known principles limiting manorial rights were settled in this way; among others, the doctrine which in its origin must have been most beneficial to the copyholder, that all so-called arbitrary fines must be reasonable, the standard of reasonableness being taken at two years' value. The most destructive influence exercised by the King's Courts over the manorial jurisdictions consisted probably in the inclination of the higher tribunal to narrow the area of land held on tenures traceable to the ancient villenage. The King's Court would bind a lord to prove strictly that a particular piece of land was copyhold. The free tenure, technically called socage, was thus always extending at the expense of servile tenures; and Roger North expressly tells us that, at the time of which he writes—that is, about the middle of the seventeenth century—'most manors in England were more than half lost.'

What the Courts at Westminster Hall were to the English Manor, the French Parliaments were to the French Fief. They were originally creations of the King; the pedigree of the Parliament of Paris is as distinctly traceable as that of the Queen's Bench to the ancient Curia Regis; and originally the Parliaments were as untiring as the Courts of the English Kings, and in the teeth of far fiercer protests from the French nobility, in extending the authority of royal law at the cost of local law. Not only did they employ against the signorial courts the same weapons which were used by the English judges, but they borrowed a special instrument of attack from the Roman law, by insisting on their right to hear appeals from all subordinate jurisdictions. Yet there is no doubt that this hostility slackened after a while. Although, as I before said, a special current of decision set in in the latter half of the eighteenth century, yet, on the whole, the later doctrine of the French Parliaments was '*Nulle terre sans seigneur*;' and thus there was always a presumption against the existence of the free tenure most nearly corresponding to our socage.

The Parliament of Paris, just before the Revolution, ordered the work of Boncerf, 'On the Inconveniences of Feudal Rights,' to be publicly burnt; and the decree no doubt testifies to the opinions most strongly and permanently held by the majority of the French judges.

There is a general agreement among historians of French law that this later tenderness of the French Parliaments to signorial rights and signorial jurisdictions is attributable to the interest which the French 'nobility of the gown' had acquired in signorial privileges. The change of feeling is connected with the innovation, generally regarded as disastrous, by which offices in the great French judicial assemblies became purchasable and hereditary. Thenceforward, as M. Fustel de Coulanges has observed, a judge was almost invariably a man of inherited wealth; in the France of that day, the only investment for wealth was land or interests in land, and proprietorship was just as likely to consist in a right to signorial dues as in ownership of the soil. I am not in a position to controvert this view; yet I may venture to interpose the remark that the student of English history will perhaps doubt whether in all states of society the saleableness of judicial office is an unmixed evil. Our associations with the French Parliaments do them a certain amount of injustice. They had in fact inherited, from a time when legislative and judicial power were not clearly separated from one another, a claim to check the legislation of the Kings of France, by refusing to register their edicts when they were, as we should say, unconstitutional. Their not always wise and almost always feeble efforts to stand in the way of high-handed legislation, are apt to lead us into contrasting them unfavourably with that famous body bearing the same name which has so long made laws for Englishmen. But, as courts of justice, they were extremely remarkable, more especially for having much of that independence which we are used to consider a natural and necessary characteristic of legislatures. The very defects of their constitution contributed to this independence. While the justice administered in the English Courts was from very early times more emphatically than in any other European country the King's Justice—while each of the four Stuart Kings found no difficulty in packing the English bench with his creatures—the seats in a French Parliament were filled by men who retained a certain measure of independence, exactly because they had purchased or inherited their offices. The Parliaments may be justly taxed with many faults, but they were never servile instruments or pliant nominees of the King, down to the day when the States-General, which had not met since 1614, again assembled in 1789, and ground the King and the Parliaments and all French institutions to powder.

There were other causes, besides the tendency of judicial decision in the King's Courts, which helped to prevent the growth in this country of that spirit of discontent which exploded among the French peasantry in 1789 and 1790. I have no doubt that we must reckon among them that aggregation of property in large estates which is of old date in this country, though the pace at which it has proceeded has greatly increased of late. It may have produced other evils, but it reduced the particular evil of which I have been speaking to insignificant proportions. I could not fully account for this aggregation without entering upon the technical history of land-law ; but one of its economical causes may be noticed here. The English Lords of Manors—a class which, it must be borne in mind, includes the forerunners of both the English nobility and the English gentry—had been originally much poorer than the corresponding order in France. The forerunners of the French nobility had settled or risen to power in some of the wealthiest, most populous, and most highly cultivated provinces of the Roman empire ; and the imposts which afterwards became their feudal dues gave them no doubt great relative opulence. But England was a country of large forests and wastes, as indeed might be inferred from Macaulay's famous Third Chapter, describing its condition in comparatively modern times. Now one of the best ascertained incidents in the growth of feudalism is the falling of the waste lands of the manor into the hands of the lord, and a particular circumstance gave an especial importance to this gradually acquired property. England in the middle ages had a source of national wealth which can only be compared with our present coal and iron, with the wines of modern France, or with the gold of Australia and California. Her soil, her climate, and doubtless her tenures, were specially fitted for the production of wool—those 'wools of England' which the King, in the Roll of the Ordinance of the Staple, is made to call 'the sovereign merchandise and jewel of our realm.' The English wool supplied the industrious cities of Flanders with material for their looms, and was carried to all points of the Mediterranean seaboard. This it was which turned a poor nobility into a rich nobility ; and, when the Wars of the Roses have closed, a popular movement which has attracted too little attention and which has been much misunderstood shows the English lords of manors rapidly acquiring land, and acquiring it for purposes of sheep-farming and of agriculture on a great scale. But the French *noblesse* seem to have never been able to buy up the holdings of their former villeins. A certain number of them had the vast estates described in M. Taine's recently published volumes ; but, taking France as a whole, and excluding Church and Crown lands, the sense of property in land was not in the seigneur but in the peasant. It is one of the most vulgar of errors to suppose that small properties in France date from the Revolution ; immediately before it, Arthur Young, one of the most observant of English travellers, expresses himself as amazed at their multitude. And this multitude was increasing, since the peasants were buying up the domains of the richer nobility, ruined by the court life at Versailles. But all this mass of petty proprietors was subject to the payment of feudal dues and to the curtailment of their profits by small monopolies ; and we may gain a feeble notion of the exasperation which the system caused by recalling the days when the English farmer had to allow the tithe-owner's agent to take every tenth sheaf from his field. But perhaps fiction is even more instructive on the point than history. Turn to the 'Bride of Lammermoor,' and gather from it the opinion which the feudal tenants of the Lord of Ravenswood had of the raids of Caleb Balderstone on Wolfshope —extend this to a whole population and understand that a legion of Caleb Balderstones overran France— and one may be able to bring home to oneself the view which the French peasantry took of the institutions under which they lived.

If we turn to England, we have reason to think that, by the end of the last century, the bulk of the class corresponding to the French peasantry consisted either of agricultural labourers or of tenant farmers. Doubtless much might be said on the excessive multiplication in this country, as compared with others, of the first portion of this class, the agricultural labourers; but the tenant farmers, though not given to hide their grievances, have never been politically dangerous. It is not indeed to be supposed that the Copyholder, cultivating his own land, is never found even now; probably a part of the very considerable number of small landowners which the so-called new Domesday Book shows to be left to us consists of this class. Several of them were examined by the Committees of the House of Commons which inquired into copyhold tenures, and they were pressed with the question whether they were not at all events better off than the farmer holding on lease who paid a rent, not at irregular periods, but regularly every half-year. The true answer is, that a copyholder is not a hirer but an owner of land, but the comparison implied in the question is significant. No doubt the status of the tenant farmer has had much effect on the feeling of cultivating copyholders. It has served as a standard with which to compare their own condition; and indeed it is a fact now known to lawyers that copyholders in the sixteenth and seventeenth centuries frequently impaired their legal position by accepting leases of their land from the lord of the manor. But the French peasant, holding by servile tenure, never compared himself with the farmers of the domain land of the nobles, who were a very special class, the *metayers*, not only hiring their land from the lord, but having it stocked by him. The peasant compared his lot with that of the nobles themselves, and bitterly chafed at the contrast.

I have yet to mention one cause which perhaps more than any other prevented not only manorial rights but all rights in land from being seen in England at the end of the last century in precisely the same light in which they were viewed in Continental countries. It is a fact of great political and juridical interest that from very early times landed property changed hands by purchase and sale more frequently in England than elsewhere. The unusual *legal* facilities for this which existed here belong to that technical history of law from which, as before, I abstain; but it was certainly the early wealth of the country which led chiefly to these transfers. Some jurists have laid down, as a general principle, that every acquisition of property is founded on a previous contract or agreement. This no doubt is historically untrue, but the mistake is one which is closely connected with some of the most widely received ideas of the eighteenth century. The sacredness of contract was one of the fundamental ideas of the French philosophical creed, and it strongly influenced the proceedings by which the manorial rights of the French nobility were taken away. In the end, the nobles received no compensation for the loss of these rights ; as the flame of revolution gathered head, it was as much as they could do if they saved their lives. But this was not at all intended by the First or Constituent Assembly. It abolished without compensation those rights only which it supposed to have sprung from the ancient helplessness of the villein ; but wherever any class of rights seemed to it to have originated in a contract between the lord and his vassal, it abolished them indeed but provided for the lord's receiving their money-value. The distinction did some honour to the spirit of justice prevailing in the First Assembly, but no doubt it was founded on historical error. There is no reason for supposing that manorial rights originated in simple violence, but there is equally little for supposing that any large number of them originated in agreement.

What, however, was untrue of France, was true in a certain sense of England, and is still truer now. The title of the Lord of the Manor and the title of the Copyholder were then, as now, far more deeply rooted in agreement than in any other deeply feudalised country. The lord had often, personally, or through his predecessors, purchased his rights ; the copyholder had constantly obtained his land subject to manorial rights, by purchase from somebody else. It will be found that English political economy and English popular notions are very deeply and extensively pervaded by the assumption that all property has been acquired through an original transaction of purchase, and that, whatever be the disadvantages of the form it takes, they were allowed for in the consideration for the original sale. I cannot doubt that this assumption, to a very great extent a true one, is a very valuable safeguard to property; perhaps in our day not less valuable than the general sense of its expediency and than that feeling, as old as the oldest rudiments of civilisation, which has translated itself into the legal rules of prescription and into the respect of the most permanently powerful section of every society for its established institutions. If this be so, the immediate practical lesson is that we owe our best wishes to those attempts, hitherto not very successful, which have been made to give an impetus to the exchangeableness of land. If they ever succeed, they will facilitate one of the most conservative and reparative of processes, the purification by contract of the title to property.

I do not wish to be understood that the contrast between the view of feudal obligations and rights taken in England and France is wholly to be explained by the causes which I have analysed in this paper. This set of causes appears to me to have been kept too much in the background, and therefore I have thought them not undeserving of attention. It belongs to the civil historian to bring to light others which are intermingled with the whole structure of French society. De Tocqueville has strongly suggested, and others after him will probably demonstrate, that the enormous social prestige of the French Court and its constant indulgence of its military tastes had at length turned the French territorial nobility into a caste as distinct from the cultivating peasantry as is the Rajput from the Sudra, as distinct as was the white planter of the Southern States from the negro who laboured in his cane-fields. The effect of this deep alienation was completely to alter the normal or natural character of the social group of which I have spoken, the Manor or Fief. Left to itself, it is one of the most conservative of all institutions. In our own country the Manor is in extreme decay, and chiefly survives in its ecclesiastical organisation as the Parish. In France a revolution has passed over the Fief, and it has become a mere administrative subdivision, the Commune. But, as we move eastwards through the German and Sclavonic countries, this primitive social organism grows stronger and stronger. It is plainly discernible under the superficial crust of Mussulman institutions, until in India it emerges in its most ancient form, as the Village-Community, a brotherhood of self-styled kinsmen, settled on a space of land. Everywhere, however, it offers a more or less stubborn resistance to change; whether the instrument of change be military conquest or the centralising legislation of well-intentioned rulers, who from the nature of the case can only look on nations as miscellaneous aggregates of individuals, and can at most aim at the greatest happiness of the greatest number. Nobody who knows England outside cities and towns will think that deference to the Squire and the Parson is a phenomenon only fit to point a sarcasm or a joke. No Frenchman, except a Parisian, will laugh at what Frenchmen call the patriotism of the Steeple. But in the latter half of the eighteenth century, the normal operation of the Fief was reversed in France. Many causes, and among them that personal friction which is the despair of all who would make History a science, had produced among the peasantry such intensity of hatred to their lord that they were ready to find allies against him anywhere—before the Revolution, in the despotic King and his usurping agents—after the Revolution, in the Convention, in the Jacobin Club, in the Directory, in the First Consul, who was soon to be the Emperor. And even now the tradition of the feudal dues and the fear of their revival are political influences of the first order, tending to make a great part of the nation ready, or not reluctant, to throw itself (as a great French orator said) into the arms of the first lucky corporal who makes it believe that he can preserve the institutions created by the Revolution, without bringing back the Revolution itself.

NOTES AND ILLUSTRATIONS.

Note A.

VILLAGE-COMMUNITIES AND MANORS.

Although no question has been more discussed by German and English scholars, the exact mode in which the Manor or Fief arose out of pre-existing social forms is still a very obscure problem. In a work published ten years ago ('Village Communities in the East and West'), I gave an abridged account of all that was then known or had been conjectured on the subject, but additions are being constantly made to our knowledge—in some small degree, I hope, owing to the book I have named——and much information may be expected from Russia, where the growth of lordships and of the chief incidents of villenage are of relatively recent date, and where there appears to be materials for an authentic history of this social transformation. I trust that Mr. Mackenzie Wallace will not long withhold those results of special investigation which he promised in the preface to his work on Russia. On another aspect of the subject, a forthcoming work of Mr. Frederick Seebohm, which I have had the privilege of seeing, will throw a great deal of light.

This, however, is a walk of investigation in which the caution given in a Note on 'The Gens' to Chapter VIII. is especially necessary. We must make full allowance for the imitativeness of mankind. A great number of Village-Communities to be found in the various parts of the world, and a great number of Manors which still exist in England in extreme decay, must have been originally mere reproductions of a model which had grown into favour. Much of the waste land of India, at most held previously in vague tribal ownership, was colonised by groups of men who settled down in Village-Communities because they knew no other form of common cultivation, and the waste places of Europe were extensively brought under tillage by colonists arranged in manorial groups under religious bodies or powerful men who had obtained large grants of land. There are, and have been from time immemorial, parts of the world in which settlers would as naturally plant themselves in these groups, as English or Scottish emigrants in Canada or New Zealand would now establish themselves on separate farms to be cultivated by themselves and their children, or by hired labour. All, then, that we can hope to discover is the typical form. Now the typical Village-Community—a body of self-styled kinsmen, having a government of their own, and engaged under fixed rules in common cultivation—is too peculiar a group to have arisen by accident, or to have had its origin in individual caprice. The evidence seems conclusive that it first grew up in remote barbarism, though in barbarism probably not older than the period at which mankind began to cultivate cereals, or to combine that cultivation with the pasturing of flocks and herds. It may give an idea of the wide diffusion of the Village-Community in its more archaic shapes if I mention that it has been observed not only in the largest part of India, but in the Fiji Islands (by Sir Arthur Gordon), and among the Berbers of North Africa (by M. Ernest Renan), and that what appears to be a distinct form of it, followed by the more southerly tribes of North American Indians, is described by Mr. Morgan in the fourth volume of the United States Survey of the Rocky Mountain region, which appeared last year. Nor is it possible for me to doubt that the typical Manor arose out of the Village-Community. Everybody who has made for himself a clear mental picture of the last group will see that it contains everything which is found in the earliest Manors, with no differences except those which come from the substitution of individual for popular authority. Everything which the lord can do can be done by the council of village elders, or by the village-headman, these last, however, being responsible to the community, while the lord tends more and more to become a mere owner, just as the King of France came to be called by the lawyers the King-Proprietor of all French land. But beyond this account of the relation between the Types, it would not be safe to go. Both the type of the Village-Community and the type of the Manor have been extensively copied,[1] and here and there in surprisingly recent times. Their wide extension by colonisation is, I suppose, the source of a paradoxical opinion which I have seen, that their most distinctive peculiarities are altogether modern.

The question of the origin of Manors or Fiefs established in Western Europe, and then spread far and wide by artificial agency, is wrapt in obscurity. I argued in a former work that everything which contributed to what we call feudalism must have sprung either from barbarous custom or from Roman law ('Ancient Law,' pp. 364 *et seq.*); but from which source were the germs of manorial authority derived? On the one hand, the examination of the Theodosian Code shows that the great estates of the Roman proprietary—their *villæ*, cultivated by *coloni* and slaves—contracted a certain resemblance to the Manor, which I myself am, on the whole, disposed to explain by the number of cultivators of barbarous origin with which they were filled. I have always distrusted the implied assertion of the Roman lawyers that the multitudinous Roman slaves had no institutions at all; and I imagine that a vast property, crowded with barbarians, would naturally fall under a system of management not unlike the mechanism of one of the most widespread of barbarous institutions. It is certainly significant that the Germanic draftsmen of Codes and Charters always used the word '*villa*' for what we call a village-community. While I certainly cannot accept the conclusion to which some learned Frenchmen incline, that the Manors of the continent are in their origin nothing but Roman *villæ*, still it seems only reasonable to suppose that in the former Roman provinces the organisation of the *villæ* did assist in causing the cultivating groups to take the manorial form rather than that of self-governed village-communities. It is to be noted at the same time that the oldest of the barbarous codes, the Lex Salica, knows nothing in its earlier and genuine portions of manorial authority. The *potestas dominica* of which it speaks is 'royal' power. It knows the village-community under the name of *villa* (see the Title 45, 'De Migrantibus'), and in describing one of its even now marked characteristics, its rigid exclusiveness, it implies that the community is one of freemen entitled to sue before the free Court of the Hundred. The

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[1] The earliest settlers in New England appear to have planted themselves in townships having a strong resemblance to village-communities. Manors were found in the Southern settlements. See *John Hopkins University Studies*, edited by H. C. Adams. 1882.

Manor appears, however, to have been known to the compilers of the later Leges Barbarorum.

The difficulty of attributing the origin of English Manors to the Roman Villa need hardly be stated. The particular Teutonic tribes which conquered Britain came from homes so northerly that they can hardly have so much as seen a great Roman estate, and, even if they had, it is not easy to understand adventurous warriors settling down as serfs or villeins in their oversea conquests. This subject, however, is one of those most fully treated in Mr. Seebohm's volume.

It may be convenient that I should give in full the passage from Bracton stating the legal theory of villenage which prevailed in his day. 'The tenement changes not the condition of a free man any more than of a slave. For a free man may hold in mere villenage, doing whatever service thereto belongs, and shall not the less be free, since he does this in regard of the villenage and not in regard of his person. . . . Mere villenage is a tenure rendering uncertain and unlimited services, where it cannot be known at eventide what service hath to be done in the morning—that is, where the tenant is bound to do whatever is commanded him' (fo. 26*a*). Again : 'Another kind of tenement is villenage, whereof some is mere and other privileged. Mere villenage is that which is so held that the tenant in villenage, whether free or bond, shall do of villein service whatever is commanded him, and may not know at nightfall what he must do on the morrow, and shall ever be held to uncertain dues ; and he may be taxed at the will of the lord for more or for less, . . . yet so that if he be a free man he doth this in the name of villenage and not in the name of personal service ; . . . but if he be a villein [by blood] he shall do all these things in regard as well of the villenage as of his person' (fo. 208*b*). The only difference in the services was that the *merchetum* on marrying a daughter, being an incident of personal servitude (as a fine paid to the lord for depriving him of a slave), was not demandable from the free man holding in villenage' (F. Pollock, 'Notes on Early English Land Law,' 'Law Magazine and Review' for May 1882). The whole of Mr. Pollock's valuable paper deserves consideration.

CHAPTER X.

CLASSIFICATIONS OF PROPERTY.

All who have any knowledge of Legal History are aware of certain distinctions which run through all commodities or through large departments of them, and which cause the objects of enjoyment lying on either side of the line to belong, in the eyes of lawyers, to widely different provinces of law. Among these distinctions, there is that which the ancient Roman lawyers drew between Res Mancipi and Res nec Mancipi—that is, between Things which required and Things which did not require for their transfer the conveyance of Mancipation; there is the mediæval West European distinction between the Allod and the Feud, between allodial land and feudal land; there is the still surviving English distinction between Realty and Personalty, and finally there is the late Roman and modern European distinction between Res Mobiles and Res Immobiles, between movable and immovable property.

We only know the distinction between Movables and Immovables as relatively modern in the Roman

State and in Europe. It is the result of an attempt of the Roman lawyers to abandon the old historical classifications, and to classify commodities, Property, the objects of enjoyment, according to their actual nature. The generalisation has required but little subsequent correction; the difficulties which have arisen in using it have been insignificant, and have occurred only on the very border-line between the two great classes of Things. In the Middle Ages, the fact that a tree, though immovable, generally acquires value through being hewn down and becoming movable, and possibly some local practice of employing movable wooden frames in the structure of houses, suggested to the expositors of a few early German legal systems a definition of movables as everything which could be destroyed by fire; and, in more recent times, the question of the proper place to be assigned to a class of things of which modern manufacturing industry has greatly increased the importance—'fixtures,' as we call them, the 'immovables by destination' of French law—has occasioned doubts and disputes. Still, on the whole, if law had really been founded on the principles imagined in the last century to constitute its basis—on those principles of simplicity or fitness or good sense which are associated with the words 'Nature' and 'Natural'—it is probable that no classification of commodities would have struck mankind sooner than that which divides them into movable and immovable. We know, nevertheless, that the whole course of Roman legal modification from the Twelve Tables to the reforms of Justinian had to be gone through before this seemingly obvious distinction formally superseded the old historical distinction between Res Mancipi and Res nec Mancipi, the first including Land, Slaves, Horses, and Oxen, and the second everything else ; and the curious fact remains that the English-speaking communities—England, her colonies, and considerably more than half the States of the American Union—still reject the improved Roman classification, and, separating leases of land for years from the bulk of immovable property, join them to personalty or movables. Thus stubbornly do the old historical classifications hold their ground. But still, if we firmly grasp the truth that these historical classifications can only mean that the commodities which they place in the highest class must have been at some time or other the sole important subjects of proprietary right, and that the others either did not exist or were of trifling value, we cannot but see that there must have been a still earlier time when the accepted historical classifications were themselves modern. The most archaic of them, one probably as old as any conscious attempt to draw this kind of distinction, is that bequeathed to us by the Romans. Yet land, slaves, horses, and oxen cannot, as subjects of individual property, have been of contemporaneous origin. There must have been a time when a wild animal tamed, which was a rarity, was of more value than a hundred acres of land, which was superabundant. The domain of a tribe, as soon as the history of mankind began, may have been jealously guarded by it as exclusive hunting-ground, as marking the limits which none but a tribesman could step within save for bloodshed or plunder, or may have been reserved by it (in a later stage of society) for pasture; but each man's share of this domain was of less value to him individually than a slave, a horse, an ox, or even than a flint-headed axe or spear. All this follows from the simplest economical axioms; but the vestiges of the older (and yet probably not the oldest) state of the primitive objects of enjoyment are plainly stamped upon one authentic record of archaic custom, the ancient Irish law; and they seem to me equally discernible in the ancient Teutonic Code, the Lex Salica, which, whatever else it is, is pre-eminently a body of rules protecting the ownership of kine, swine, sheep, goats, horses, and even bees.

I pass to a distinction which rose into importance in an age nearer our own—the distinction between the *allod* and the *feud*, between allodial and feudal land. The *allod* in some form or other is probably as old as the institution of individual landed property, and we may regard it as equivalent to or directly descended from the share which each man took in the appropriated portion of the domain of the group to which he belonged—tribe, joint-family, village community, or nascent city. But many facts—facts which are receiving constant additions—appear to me to show that this share was not at first a definite area, but what we should now call a fraction or aliquot part of the divisible land. The shares of the domain which each family or household could claim shifted among the households under a system of distribution in turns or by lot, and each share very slowly became appropriated to particular families. We only know the society of the Roman Commonwealth when it had reached this last stage; indeed, the hungry struggle for the public domain which begins authentic Roman history would seem to show that the system of 'shifting severalties,' which had not quite died out in England fifty years ago, was long over among the free Roman peasantry; and the traces of an older economical condition must be sought in that copious law of servitudes or easements into which modern lawyers of all nations have dug as into an inexhaustible mine, and which seems to show that the agricultural land of every Roman was really *servient*, as the technical phrase ran, to his neighbours in respect of rights of way, rights of riding, driving, and draught, rights of drawing and lending water, and a mass of other rights, far beyond all modern experience and example. The abundant Roman servitudes appear to me to point back to the same modified common enjoyment of land which characterised other Aryan races; but the early period at which the land of a free Roman peasant became appropriated to his family in strict severalty affected the legal and economical history of Roman society very strongly, and thus becomes a fact of much importance in the development of the Western world.

There are indications that at first the possession of allodial land was everywhere the distinctive privilege of the freeman. Down indeed to the first French Revolution the exceptional tenure of land in 'franc-alleu,' which here and there survived amid the general feudalisation, was held by Frenchmen in high honour. Nevertheless, the modern history of allodial land is essentially the history of the holding of land by servile or by very humble classes. It bequeathed its great characteristic, its divisibility at death between all the children or all the sons, to that lowest stratum of landed right upon which the feudal structure reposed, either because communities originally free had sunk on all sides into villenage, or because the *allod* was the type of all enjoyment of land, and was followed in colonies of serfs planted by a Roman *dominus* or Teutonic lord. All peasant holdings in France were adjusted to this type till the Revolution, and so were German peasant estates down to a considerably later date. We have traces of its peculiar rules in the Gavelkind of Kent, and in much copyhold land; and a comparison of the treatises of Glanvill and Bracton enables us to fix the time when the most widely diffused of English tenures—socage—was just putting off the characteristics of the allod, and putting on those of the feud. But our current Real Property Law is coloured throughout by the feudal view of land, which is that, when held in individual enjoyment, it is primarily impartible or indivisible. The great system of land-law, resting on this feudal conception, though occasionally wrested into departure from it by sovereign authority, is essentially a system of rules regulating the tenure of land by noble classes. The allodial tenure, which is believed to have been originally the tenure of freemen, became in the Middle Ages the tenure of serfs. The feudal tenure, which was certainly at first the tenure of servants who, but for the dignity of their master, might have been called slaves, became in the Middle Ages the tenure of noblemen. It was by an exception, and a remarkable one, that in our country the land-law of the nobles became the land-law of the people.

We know thus much of the beginnings of that feudal system, of which the feudal land-law was a part, that it had several diverse origins. The land on the border lines of the Roman Empire was held by soldier-cultivators on tenure of military service ; and this must have had something to do with it. The Roman law of Patron and Client must have had something to do with it ; for it plainly suggested many customary relations of lord and vassal. We see much which cannot but have contributed to it in the primitive or barbarous usages of the Aryan races re-introduced into the Roman Empire by the Germans. Among these, society was distributed into compact groups of families or clans, the first administered by the eldest member subject to a species of election, the second often, if not always, governed by some member of a ruling family, selected by the process which the Irish called Tanistry. And these Chiefs or Kings were in the habit of buying or rewarding the services of their immediate retainers by gifts. We can put our finger on a variety of the ingredients of feudalism spread over a large surface. Nevertheless, with all our knowledge, there is still the greatest obscurity on one point. How was the conception of landed property so completely changed ? Nothing can be more singularly unlike than the legal aspect of allodial land, or, as the Romans would have called it, land held in *dominium*, and the legal aspect of feudal land. In passing from one to the other, you find yourself among a new order of legal ideas.

Perhaps it requires a lawyer alive to the significance of technicalities, and tolerably acquainted with the later Roman and earlier feudal law, fully to estimate the thoroughness of the transmutation. An account of all which it implies would be out of place here ; but, to take only one phase of it, no subversion of an accepted legal notion can be more striking than that of the Roman (which is the developed allodial) view of land as essentially divisible by the feudal conception of land as essentially impartible. The Roman lawyers note, as a fundamental difference between immovable and movable property, that land is divisible *ad infinitum*, and may be always so conceived though actually undivided, while movables are not properly capable of division. They could conceive land as held (so to speak) under different legal dispensations, as belonging to one person in Quiritarian and to another in Bonitarian ownership, a splitting of ownership which, after feudalism had fallen into decay, revived in our country in the distinction between the legal and the equitable estate. But there is no symptom that a Roman lawyer could conceive what we call a series of estates—that is, a number of owners entitled to enjoy the same piece of land in succession, and capable of being contemplated together. It is a very remarkable fact that when these great legal thinkers had to form an idea of an interest in land so familiar to us as an estate for life, they had to go for an analogy to the law of servitudes or easements. A Roman usufruct of land was in its practical effects very much the same as an English estate for life; but the Roman jurists classed it with rights of way over another man's field, or a right of drawing water from another man's well. The impression left on my mind by a variety of passages in the Roman legal records is that, if a Roman lawyer had been asked to take into his mental view a number of persons having rights together over the same property, he would have contemplated them not as enjoying it in turn, but as dividing it at once between them. Thus far was he from conceiving the ownership of the same area of soil as distributed over tenants for life and remainder men, tenants in tail male, and tenants in tail female, doweresses, tenants by the courtesy of England, and reversioners. This long series of persons, all having ascertainable rights capable of co-existing in the same property—this long succession of partial ownerships, making up together one complete ownership, the feodum or fee—could not have been dreamed of till a wholly new conception of landed property had arisen. When, several centuries after the birth of feudalism, lawyers sought to employ the Roman law to express the feudal relations, it had to be violently wrested from its true meaning and purpose; as was notably the case with the law of Fidei-commissa, or testamentary gifts in trust.

One particular agency by which this great revolution of legal ideas was, at least, partially effected, has been of late the subject of controversy between some of the most learned men of our day; and the controversy, I am sorry to say, has been marked by much of the bitterness peculiar to disputes which are still confined to the learned and have not yet become popular. The Beneficium, or Benefice, an assignment of land by a conquering Teutonic king as the reward or price of military service, is allowed on all sides to have had much to do with this great change in the legal point of view. Whether the benefice was always a gift of public land—as M. Fustel de Coulanges insists that it was—in the countries which passed under the sceptre of the House of Clovis, or a gift of confiscated land—as there is reason to think it was, at all events, in some subjugated provinces of the Roman Empire—it began a new stage in the history of land-law. In its earliest form it was unlike the estates of matured feudalism, since (according to the better opinion) it was not at first generally hereditary; but it was still more unlike the allodial lot of the Teutonic freedman and the fundus of the Roman provincial citizen. One modification of Roman landed property came near it—the Emphyteusis; and I still hold to the opinion that we have here one of the sources of the new legal conception. But though this explanation is plausible, as far as it goes, it is only partial ; and, moreover, the symptoms of a change in the legal view of landed property are not confined to countries which had formed part of the Roman Empire, but are found in purely Teutonic lands.

Feodum, the later Teutonised name of the Beneficium, is now allowed to have been derived from the old Gothic word '*fihu*,' or '*fiu*'—cattle. The term is supposed to have come to mean 'property,' just as *pecunia*, from *pecus*, contracted this meaning. A few years ago, after pointing out the great part played by cattle in converting Irish tribal holdings into something like feudal tenures, I stated that I suspected 'feodum' to have a closer connection with cattle than the usual etymology implied. M. de Laveleye, commenting on this remark, has stated that he has no doubt of the association ; and he observes that we thus see the meaning of the original contrast between allodium and feodum—al-od, the complete property; fe-od, the cattle property. Plausible as this is, I should have hesitated to build on it as a basis but for the remarkable results disclosed by the examination of the Salic Law. It undoubtedly shows that an ancient Law of Movable Property may deeply affect a Law of Land. Now, we know that among the Germans observed by Tacitus or his informants the chiefs were rewarded by King or Commonwealth with assignments of cattle and corn; the companions of the chief, living in his house, received a horse and arms as pay. It was exactly the system which prevails at this moment at the Court of a Kaffir chieftain in North Africa. Now, let us conceive this system modified by the growth of population or by conquest, but otherwise unaltered. In the first case, land increases in value through natural economical causes. In the second, the Teutonic host become the masters of lands long since populous and filled with wealth accumulated during the Pax Romana. If, then, we assume that, at once in the occupied provinces and more gradually in Teutonic territory, gifts of land took the place of gifts of cattle and arms, but that the old associations with assignments of movables continued to attach to a Benefice in land, the transfer of idea—to my mind, at all events—explains better than anything else the transformation of the legal aspect of landed property. I can now understand why the Benefice was not at first hereditary; why, even when it became hereditary, the donor could select the son who was to inherit; why he could cause it, after the death of any holder, to *remain* to somebody else; why, like a horse, or a suit of armour, or a herd of cattle, it could pass through a succession of hands and then *revert* to the giver; why it was impartible, the ancient gift of movables having to be restored entire either in *genere* or in *specie*; and lastly, to pass to more technical matters, why such importance was attached by the early feudal law to seisin, or actual possession, and why the gift of a feudal estate implied warranty of the title to it, which a grant of allodial land never did.

As a matter of fact, we have in the Irish usages lately brought to our knowledge a system just such as we might expect if we were permitted a view of Teutonic customs somewhere between the first and the fifth century—a feudal system (if we may so call it) dependent on cattle and kinship instead of land and tenure. I will not now repeat the account which I gave on former occasions of the remarkable social mechanism disclosed by the Brehon laws; but those who will examine it carefully will find a number of special feudal rules much more simply explained by the relations of Irish chief and Irish clansman than by any theory founded on the exigencies of military service or on spontaneous modifications of property in land.

I must not be understood as affecting to offer a complete account of the complicated system of rights and duties, some personal and some proprietary, which made up what we call feudalism. The mailed knight of the days of chivalry, who is spoken of in much of history and historical romance as if he were a product of one age and one region, may be shown to have obtained from all sorts of quarters the materials of the ascendency which he long exercised in Western Europe. His iron armour came from the household cavalry of the Eastern Cæsar at Byzantium; the stirrups, without which he could not have worn it on horseback, were brought, with his horseshoes, by Tartar riders from the steppes of the furthest Asia. Just so feudalism, which in the twelfth century looks to us all of a piece, is undoubtedly the result of many converging lines of descent. We are now only concerned with the feudal land-law, and to attribute it to a single origin would be quite inadmissible. We must give due weight to the influence of purely Roman ideas: those connected with the Emphyteutic form of property, those springing up among the military colonies on the German border, and those which had their origin in the Roman law of Patron and Client. Competing with these Roman ideas are others even more potent, of barbarous or primitive origin. I cannot doubt that, when the Benefice or Feud became hereditary, the plan of succession was mainly taken from that which the men of primitive Aryan race had considered as appropriate to chiefships or sovereignties, and which in one of its stages the Irish called Tanistry. As little can I doubt that the general tumult of the Western world, during the dissolution of the Carolingian Empire, contributed to diffuse succession by Primogeniture on the one hand, and to produce

Villenage on the other. The imminent daily danger caused little societies to cluster round their natural leader, or some soldier of fortune who had taken his place; the general impoverishment caused men to be depressed to the condition of beasts of burden. Unquestionably the squalor and poverty which meet us on the threshold of the Middle Ages did not characterise the provinces of the Roman Empire, even on the eve of its fall. There can be no greater delusion than that the Roman provincials were pauperised by taxation; and M. Fustel de Coulanges seems to me to have quite proved in his last work that Gaul, at all events, even when swarming with barbarians, was still full of wealth and splendour. But no surer ruin can be wrought to the hoarded capital of centuries than by such an anarchy as prevailed on the relaxation of the Carolingian power. Lord Macaulay, in contrasting India as the English found it with the impressions of it entertained by European adventurers, has said that it is really a very poor country; but it is very difficult to believe this of so great an area of fertile soil crowded for ages by an industrious population. The true secret of the poverty of India, from which she is slowly recovering, I take to be the desolation caused by the wars and brigandage of about 2,000 several chiefs while the Mogul dominion was dissolving. I think that India during the reigns of Akhbar and Jehangir was very probably as rich as the Western world thought it; but its carefully hoarded capital was destroyed as were the accumulations of the Roman Empire. There are some very singular analogies between the dissolution of the Mogul and the dissolution of the Carolingian power—to some extent in their course, but in a much greater degree in their social effects. These, however, cannot be conveniently considered here.

One result of this revolution of legal ideas, which arose from assimilating immovable property to movable, was, I need hardly say, greatly to complicate the law of land. The complex land-law of the feudal ages was, on the Continent of Europe, essentially the law of noble classes; but in this country it became the general land-law, as I before stated, by exception. Among the many proposals which have been made for reforming it since Bentham became an authority among us, one frequently put forward may be described as a proposal to carry to its farthest consequences the early process of change in which feudalism begun. The suggestion has often been made that real property should be closely assimilated to personalty, more especially in respect of conveyance. There ought to be no more difficulty, it is said, in transferring a piece of land than in selling a horse. I believe the analogy to be unsound, and the route indicated a false one. There is far more promise in reversing than in extending the principle, in treating land as essentially unlike movables, and in a return to the ancient methods of conveying allodial land. The subject is, for several reasons, worthy of our attention.

It is to be recollected, first, that the primitive conveyances of allodial land were before all things public. Land belonged to the tribe, joint-family, or village-community before it belonged to the individual household; even when it became private property, the brotherhood retained large rights over it, and without the consent of the collective brotherhood it could not be transferred. The public consent of the village to a sale of land is still required over much of the Aryan world. Although, as we know the Mancipation in Roman legal history, it is a form of private transfer, it plainly bears the stamp of its original publicity. The five witnesses who had to assist at a Mancipation represent the old consenting community, according to a principle of representation by fives widely diffused among primitive races. As a private conveyance, Mancipation was extremely clumsy, and I have no doubt it was a great advantage to Roman society when this ancient conveyance was first subordinated to Tradition, or simple delivery, and finally superseded by it. Nevertheless, the most successful modern experiments have reverted in principle to a method of transfer even older than Mancipation, and the latest simplifications of the conveyance of land are a reproduction of the primitive public transfers in the face of the community, in a new form appropriate to large and miscellaneous societies.

In France, and in the territories incorporated with the Empire of Napoleon I., there has existed, ever since the establishment or introduction of the Còde called by his name, a system of publicly registering sales and mortgages of land. In some of the Germanic countries there was long a disinclination to adopt these expedients ; but they have now been almost universally copied on the Continent, and, as sometimes happens, the new system is most perfect where the delay in accepting it was longest. The land-registries which have the highest commendation from juridical writers are those of certain small Teutonic communities—*e.g.* the state of Hesse-Darmstadt, and the Swiss canton of Zürich. I can here give but a brief description of the mechanism. The land of the community is divided into a number of circumscriptions of no great area. For each of these a central office is established, with a staff of functionaries who are to some extent experts, and at each office a register is opened in which separate portions or groups of pages are appropriated to separate masses of land. There has been some controversy as to what the area selected for separate treatment should be—whether a space determined by land-measurement, or, as we should say, an *estate*, an aggregate of lands once held as a single property; but I believe that the historical system, that which deals with estates rather than with areas settled by land-surveyors, has been found practically the most convenient. When the register has once been opened, the legal history of every parcel of every area is thenceforward recorded in it, and every transfer or mortgage must be registered in it, under pain of invalidity. Whether a person wishing to sell or mortgage has the right to do so it is the business of the staff of experts to ascertain. It is absolutely essential to the system that the register should be easily accessible, and the formalities of registration simple and cheap.

The nearest English analogy to these new foreign systems is to be sought in the Court Rolls of Manors; and it is sometimes asserted by lawyers that the manifold disadvantages of copyhold property are compensated by the many conveniences arising from its registration in these rolls. As to the great mass of English freehold property, there is a general admission among lawyers of the expediency of registration, but vehement dispute as to the best method, and a certain disposition to look upon the practical difficulties as insuperable. It is true that these difficulties are far greater than abroad. Our land law is much more complex than the land law of Continental countries, where it has its counterpart, if it has any, in the exceptional law applied to the estates of a limited number of noble families ; and English real-property law has been still further complicated by the liberty of transfer and devise which we have enjoyed from a comparatively early period. The great difficulty with us lies in the preliminary process of ascertaining whether a person desirous of selling or mortgaging has the right to do it ; but this is in most Continental countries a comparatively easy matter, the bulk of the land having been held until the early part of this century by a tenure of strict villenage, or, as we should say, in copyhold.

My immediate object, however, is not to pass an eulogy on the principle of conveyance by entries on a register, or to weigh one system of registration against another. I wish rather to point out some remarkable consequences of registration which ought to have our attention in our special branch of study. A short time since I stated that the problems once solved by the expedient of Warranty were common to all bodies of jurisprudence. What is to be done in the case of the man, who is in fact exercising all the powers of an owner, but who has no title to show ? Is he to be at the mercy of anybody who chooses to injure or disturb him ? The Roman law answers this question by providing the vast body of rules which constitute the chapter on Possession. What has to be done with the man who has bought, with the proper formalities, but not from the true owner—or from the true owner, but not with the proper formalities? The answer of the Roman law consists in the doctrines of *bonâ fide* Possession and of ownership *in bonis* — Bonitarian or Equitable ownership. Is the Bonitarian owner or the Possessor, with or without good faith, always to have an imperfect title? The reply is in the great departments of law concerned with Usucaption and Prescription. If a man mortgages his property to a number of creditors, in what order are they to be satisfied? The volume of rules by which all systems try to solve this problem is quite enormous. But it is very remarkable that where there is a perfect system of land registry the strong tendency is to revert to the doctrines of Roman law as it must have been before Possession, Usucapion, and Bonitarian ownership grew up. The registry of the sale or mortgage of land being extremely easy, expeditious, and cheap, there is a marked disposition among the authors and expositors of law to say to the members of the community, 'Either register your transfers or mortgages, or cause them to be registered, or you shall have no rights whatever. If you neglect doing that which it is in your power to do at any moment and at a trifling cost in time and money, you shall not have the benefit of Possession, of Bonitarian ownership, of Usucapion, or Prescription. At most, there shall be an Action of Contract to compel the seller of land to register and the buyer to pay the purchase-money. As regards mortgages, they shall rank in the order of priority of registration, and if you delay going through the proper formalities, or compelling them to be gone through, you, the mortgagee, will be postponed to creditors more diligent than yourself, and you will be satisfied after them.' I follow German writers of authority in saying that this is the condition to which legal doctrine is approximating in much of Germany, though it is not quite adjusted to it. The singular result is that some of the most intricate and difficult chapters of law cease to be of any, or much, importance. The expedient of public registration is, it will be seen, purely mechanical. A contrivance very like it in principle spontaneously and very early suggested itself to the human race. Nevertheless, where a public registry of mortgage and land transfer has been established, some of the most famous and luxuriant branches of law show a tendency to dwindle and wither away under its shadow. Possession, Usucapion, Bonitarian ownership, and Hypothek occupy together a prodigious space in the Roman jurisprudence; the bulk of what corresponds to them in other systems of law is very great; if they are reduced to a fraction of their present dimensions, the diminution of the aggregate body of law will be extraordinary and will have been produced in a most unexpected way.

I have dwelt on these Continental systems of land registration, and on the effects attributed to them by German juridical opinion, for two reasons. In the first place, the fact is certainly curious that the latest improvements in the mechanism of mortgage and land transfer involve a reversion to the primitive publicity of conveyance. The public register at some accessible spot, in which all transactions must be registered under penalty of immediately forfeiting all their benefits, pretty much corresponds to the primitive assembly of the village before which all transfers of shares in the domain must be accomplished, in order that the brotherhood may consent to them and supply evidence of them by the general recollection. It is true that the ancient formalities had one object which has nothing to do with the modern. The primitive publicity of transfer went with a most rigid exclusiveness, and the public consent which was insisted upon was employed to refuse the power of purchase to strangers. The decay of the ancient public conveyances was very probably caused by a change of circumstances which made the communities either unable or unwilling to maintain their collective control over the land of their domain. In modern India the growth of wealth has greatly stimulated the spirit of individualism; buyers and sellers of land alike become impatient of the necessity for obtaining the public consent of the villagers to their bargain; the modern Anglo-Indian law is unfavourable to these archaic restrictions; and thus the primitive public methods of alienation are everywhere giving way to private transfers.[1] In the historically ancient world, the same results were most probably produced by conquest and by the absorption of one or more of the primitive proprietary groups by others stronger than themselves. In the Roman State, including a population ever more and more miscellaneous, we find, at the outset of legal history, a mere shadow of the old forms of transfer in the Mancipation; and Mancipation, long before its abolition by Justinian, was subordinated by every sort of legal contrivance to mere Delivery or Tradition. Yet even Tradition, when it became the sole Roman conveyance, retained some trace of the institutions out of which it grew. The Roman law never to the last allowed the *dominium* or right of property to be passed from one person to another by a mere contract; it was absolutely necessary that the contract should be followed by the delivery of the Thing which was its subject. This is a peculiarity which has more than once caused perplexity to persons who have consulted the Roman law of Transfer in ignorance of its being founded on a principle which the English law and the French Code have abandoned.

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[1] Two valuable Acts of the Indian Legislature, the Registration and Transfer of Property Acts, are mitigating the evils arising from the privacy and heterogeneous forms of these transfers.

The other fact to which I wish to call attention is not merely curious, but highly instructive. The tendency of German juridical opinion, which I have mentioned, shows that we are in danger of overestimating the stability of legal conceptions. Legal conceptions are indeed extremely stable ; many of them have their roots in the most solid portions of our nature, and those of them with which we are most familiar have been for ages under the protection of irresistible sovereign power. Their great stability is apt to suggest that they are absolutely permanent and indestructible ; and this assumption seems to me to be sometimes made not only by superficial minds, but by strong and clear intellects. I am not sure that even such juridical thinkers as Bentham and Austin are quite free from it. They sometimes write as if they thought that, although obscured by false theory, false logic, and false statement, there is somewhere behind all the delusions which they expose a framework of permanent legal conceptions which is discoverable by a trained eye, looking through a dry light, and to which a rational Code may always be fitted. What I have stated as to the effects upon law of a mere mechanical improvement in land registration is a very impressive warning that this position is certainly doubtful, and possibly not true. The legal notions which I described as decaying and dwindling have always been regarded as belonging to what may be called the osseous structure of jurisprudence; the fact that they are nevertheless perishable suggests very forcibly that even jurisprudence itself cannot escape from the great law of Evolution.

CHAPTER XI.

CLASSIFICATIONS OF LEGAL RULES.

ALMOST the first thing which is learnt by the student of Roman law is, that the classical jurists of Rome divided the whole body of legal rules into the Law of Persons, the Law of Things, and the Law of Actions. Although, however, his studies, as law is now taught amongst us, may soon introduce him to some vehement disputes as to the meaning of this classification, he may be long in becoming alive to the extent and importance of the literature to which it has given birth. It would seem, in fact, that in the seventeenth century, which was a great juridical era, theories of legal classification took very much the place of those theories of law reform which so occupied the minds of the last generation of Englishmen. The continuous activity of legislatures is an altogether modern phenomenon; and, before it began, an intellect of the type of Bentham's, instead of speculating on the possibility of transforming the law into conformity with the greatest happiness of the greatest number, or with any other principle, speculated rather on the possibility of rearranging it in new and more philosophical order. The improvement in view was thus rather a reform of law-books than a reform of law. The most extreme example of such theories is, perhaps, to be found in the attempt of Domat to distribute all law under its two 'great commandments' as set forth in the twenty-second chapter of St. Matthew's Gospel—love to God and love to one's neighbour. But on the whole the arrangement in which the compilers of Justinian's 'Institutes' followed Gaius, distributing law in Law of Persons, Law of Things, and Law of Actions, became the point of departure for theories of legal classification. Its history has been not unlike that of several equally famous propositions. After long neglect, it came to be regarded as an expression of absolute truth, and an essential and fundamental distinction was assumed to exist between the three great departments into which the Romans divided law. English jurisprudence was, no doubt, very little affected by this assumption, but English lawyers occasionally come across the inferences from it when they have to deal with Private International law, or, in other words, with the conditions upon which one community will recognise and apply a portion of the jurisprudence of another. At a later date certain difficulties were observed in the rigorous application of the Roman doctrine, and much ingenuity was expended in removing them, or explaining them away. Finally, it was pronounced to be theoretically untenable, and only deserving of being retained on account of its historical importance. According to the general agreement of modern writers on jurisprudence, the Roman distribution of law into Law of Persons, Law of Things, and Law of Actions, must be regarded as now exploded.

As a perfect classification of legal rules would distribute them according to their real relations with one another, and would therefore be founded on a complete analysis of all the legal conceptions, the subject has not lost its interest for very powerful minds in this century. The speculations of Austin on classification almost fill such writings of his as remain to us, and a valuable essay of John Stuart Mill on these speculations may be read in the third volume of his 'Dissertations and Discussions.' On the Continent of Europe a more practical interest has been given to such questions by the gradual codification of the law of the whole civilised world, except England and the countries under the influence of the English legal system; for a Code must be arranged somehow, and few would deny that the more philosophical the arrangement the better. But the great majority of writers on the subject, whatever their title to be heard, are agreed in depreciating the Roman classification and all classifications descended from it, and sometimes their censure is surprisingly strong. This modern fashion of decrying, and even of reviling, the arrangement of the Roman Institutes threatens to produce some reaction, and I see that a manful attempt to rehabilitate it has been made in America. A book published at Chicago, and written by a Law Professor of the State University of Iowa, is not likely perhaps to come into the hands of many English readers, but Mr. Hammond's Preface to the American issue of Mr. Sandars's well-known edition of the 'Institutes of Justinian' contains much the best defence I have seen of the classical distribution of law. My own opinion is that the now common depreciation of this distribution is not so much mistaken as misplaced. The legal classifications proposed by the most modern thinkers on these subjects are classifications of legal Rights. Every one of such systems has legal Right for its centre and pivot. But, singular as the fact may appear to those unacquainted with it, the Romans had not attained, or had not fully attained, to the conception of a legal Right, which seems to us elementary. According to the general usage of the Roman lawyers Jus meant not 'a right,' but 'law,' and usually a particular branch of law. There are, undoubtedly, certain senses of Jus in which the meaning of 'right' is approached, and even closely approached; but, on the whole, the Romans must be considered to have constructed their memorable system without the help of the conception of legal Right. We have constantly to be on our guard against illusions produced by the undoubted stability of law as compared with other provinces of thought. Some modern writers speak of the Romans as if they were to blame for not having clearly conceived a legal Right; even Mill speaks of their language on the point as 'unhappy;' but the truth is, and it is very impressive, that the legal idea of a Right was very slowly evolved. In the minds of the Roman lawyers it was entangled with other notions, and was therefore obscure. In the Middle Ages it became clearer, doubtless through its examination by the scholastics. But, unquestionably, a clear and consistent meaning was, for the first time, given to the expression 'a right' by the searching analysis of Bentham and Austin. I object, therefore, to the contemptuous language sometimes applied to the Roman map of the provinces of law, as in effect taxing persons who had not yet attained to the conception of a legal Right, with not having anticipated methods of classification of which Rights are the basis. In order to give their due to the ancient lawyers who first divided law into Law of Persons, Law of Things, and Law of Actions, we must try to bring home to ourselves the view of the field of law which this division superseded; and then we shall see, I think, that the new arrangement may have been a great feat of abstraction. The object of this paper will be to show what was the original Roman notion of the contents of a legal system; but it will derive such interest as it possesses from the light which the inquiry throws on certain primitive ideas regarding law and justice which appear to have been once diffused over a great portion of mankind.

The respect, which once amounted to reverence, for the classification of law in the Roman Institutes, though it has had time to culminate and decline, is relatively modern. There is no reason to suppose that the Roman lawyers set any extraordinary value on it. It was confined to their Institutional treatises or primers of law, the educational manuals placed in the hands of beginners. The student was soon advanced to the Prætorian Edict, and the greatest part of his pupilage was passed in the close examination of it, and in reading the numerous commentaries of which it was the text. But the Edict of the Prætor, even when consolidated by Julianus, did not divide law into Law of Persons, Law of Things, and Law of Actions. The Twelve Tables, older than the Edict, have no trace of this classification; nor has any later compendium of Roman law. The Gregorian and Hermogenian Codes were arranged upon a different principle; so was the Code of Theodosius the Second; so, manifestly, are the Code and Digest of Justinian. When the study of Roman law revived in the Middle

Ages, it was not the arrangement of the Institutes which regulated the course of legal study soon followed by thousands of students. As may be seen from Mr. Hammond's Preface, the mediæval teachers followed the so-called 'legal order,' that is, the actual order of legal topics in the text of the book before the class. The ascendency of the classification of the Institutes in fact took its rise in dissatisfaction with this 'legal order.' It survived in the law-schools, says Mr. Hammond, to the end of the eighteenth century, consequently till after the time of Blackstone; 'but the increased importance of the Institutes in the plan of study gradually made their arrangement to be regarded as the basis of all scientific systems of jurisprudence.' It has now, however, become plain, and with regard to matters far more important than legal classification, that much which the eighteenth century abandoned in the name of science and in equally respectable names must be recovered and re-examined, if the thread of human thought is ever to be knitted anew. What then was the 'legal order,' which appears in the Roman Digest and Code, and which, when those bodies of law were put together, had already maintained its place for about ten centuries in the legal records of a society of pre-eminent legal genius? I think that the question will be found to have more than a merely technical and more than a merely antiquarian interest.

The arrangement of legal topics which can be shown to have been extraordinarily persistent in the Roman law is first discovered in the fragments of those Twelve Tables which to the last were its theoretical basis. The contents of all the Tables except the Eleventh and Twelfth have been known in a general way since the time of Gothofred; but we are now only under the necessity of attending to the subjects of the first three, and especially of the First. This First Table of the primitive Code contained a number of rules *de in jus vocando*, on the first steps in a judicial proceeding, on summons to the defendant, and on the excuses, or—to employ the later Teutonic word which found its way into our own early law—the 'essoins,' which he might make for not attending. The Second Table had to do, first, with the Procedure to be followed when the case was actually in Court, and next (so it is commonly believed) with *theft*; it went at once from legal procedure to the fraudulent subtraction of a movable. The Third Table contained rules as to Deposits. We need not go further, and all which must be recollected is that the earliest Roman Code treated first of legal procedure, and then, either at once or shortly afterwards, dealt with the subjects of Thefts and Deposits; all the other heads of law discussed in the remaining Tables followed the same apparently haphazard arrangement. Let us now turn to the Prætorian or Perpetual Edict, the body of Roman Equity jurisprudence as opposed to the Roman Common Law constructed out of the Twelve Tables and out of the accretion of legal rules which had them for a nucleus. The Edict had unquestionably an order of subjects of its own. I will not now discuss the time at which, or the mode in which, this order first appeared. It began with a title manifestly corresponding to the first Decemviral Table, though usually given in different words, *de actione dandâ.* The Second Title, like the Second Table, dealt with Procedure in Court. Deposit was treated of in the Third Title; but Theft, instead of taking the first place after Procedure, as it is thought to have done in the primitive Code, occupied the last part of the Fourth Title, in which it was preceded by Marriage Portions and Tutelage. There is a general but not exact correspondence with the Twelve Tables throughout the remaining Titles, and on the whole the classification of the Edict looks like a modernised form of the ancient order of the Twelve Tables. It is well established that the distribution of subjects of the Edict was observed in the great mass of Roman legal literature, and that it influenced the earlier attempts at codification, but it was long a matter of dispute whether it determined the order followed in the Code and Digest of Justinian. At first sight there is no trace of resemblance or correspondence, but the reason is that a great quantity of prefatory matter introduces the true classification in both of these famous compilations. In the Code the preface is ecclesiastical; in the Digest there are first some general propositions about law, and then an account of various Imperial officers connected with the administration of the law or having some sort of jurisdiction. The real body of the Digest commences at the Fourth Title of the Second Book, and begins with the very subject of the First Table of the Decemviral Law, *de in jus vocando.* A close correspondence between these earliest and latest monuments of Roman law may be discerned running through no less than nineteen books of the Digest; only Theft has dropped into an obscurity characteristic of modern as distinguished from ancient law.

From this brief summary of an inquiry which has occupied the minds of several generations of learned men, it would appear that the form of the Roman law throughout the whole course of its history was strongly influenced by the primitive arrangement of subjects in the Twelve Tables. Have we any clue to the meaning or principle of this ancient legal classification? At first sight it is simply disorderly, even less capable of being referred to any dominant notion than the arrangement of our classical English Digest, Bacon's 'Abridgment,' which begins with 'Plea in Abatement to the Jurisdiction of a Court,' and goes on to treat of Ambassadors and Attorneys, but which at all events may lay claim to the convenience of an alphabetical order. The suspicion, however, that some light might be thrown on the arrangement of the Twelve Tables by what has more recently been called Comparative Jurisprudence is not new. Ever since the earliest and purest of the Teutonic Codes, the Frankish 'Lex Salica,' has been examined, it has been seen that it exhibited some curious general resemblances to the course of legal topics followed in all the monuments of Roman law except the Institutes. The first title is *de mannire*, on Summons to a Court, thus exactly answering to the First of the Roman Tables, and to the First Title of the Edict. The next seven Titles are concerned with Thefts, just as was the second part of the Second Roman Table. The Salic titles on thefts of swine, thefts of kine, thefts of tame birds, and so forth, succeed one another down to the ninth Title, where the subject of Trespass is taken up; but the code-maker immediately returns to Theft, and though he interrupts himself to treat of Homicide and other serious crimes, he is constantly recurring to Theft throughout a great part of the Code. The title corresponding most nearly to the Roman Deposits does not present itself till the middle of the Salic Law is reached: it is numbered 'fifty,' and has the barbarous Latin heading *de fides factas*; but it is most elaborately framed, and has furnished plentiful food to modern German erudition. The fact remains that the German Salic Law begins, as did the Roman Twelve Tables, with committing what to a modern legal eye is the paralogism of placing the Law of Action in front of the law; that, like the Twelve Tables, it gives a very high place to Theft—in modern law one of the most insignificant of subjects; and that it elaborately discusses contractual obligations, but that it puts them in no place in the smallest degree corresponding to that reserved in the Roman Institutes for the Law of Contract. These resemblances, as I stated, attracted notice some time ago; but it was matter of dispute whether they proved anything more than that the Frankish code-maker had heard something of the Roman 'legal order.' On the one side the strong probability might be urged that the Theodosian Code had something to do with the Frankish codification; on the other, it might be said that the substantive law of the Lex Salica shows no signs of derivation from the Roman jurisprudence. It is purely barbarous. Again, the order of topics in the Lex Salica is not that of the later Roman law, which the Frank might conceivably have followed, but that of the earliest Roman law, of which it is almost impossible that he can have known anything. After Procedure, the Salic Law deals with Theft. So, according to the better opinion, did the Twelve Tables; but in the later Roman law Theft had become a criminal offence, and not one of any importance. The fact is, the prominent place assigned to Theft is a distinctive mark of barbarous law. It belongs to the period when movables are of far higher value than immovables, personal property than land. No surer inference can be drawn from the insistence of a lawgiver on Theft than that the community for which he legislated had more land than sufficed for cultivation, and that the common prey of violence or fraud was the movable, the slave, the domestic animal, or the ornament or utensil which was the product of workmen making up for unskilfulness by laboriousness.

The arguments against the derivation of the Salic from the Roman arrangement have always seemed to me to preponderate, independently of new materials for an opinion. But these new materials place the matter beyond a doubt. By itself indeed the lately revealed Irish law would carry us a very little way. Its great peculiarity is the extraordinary prominence it gives to Procedure. The principal Irish law-book, pretending to be a Code and claiming in its preface to have been framed when 'Theodosius was monarch of the world,' is almost wholly taken up with the law of Distress. Undoubtedly we have here the Celtic counterpart of the First Roman Table, *de in jus vocando*. Distraint is the ancient Irish method, and probably it was once the Greek, the Roman, the

German, and the Hindu method, possibly it was the universal method, of *vocatio in jus*, of compelling a person complained against to come into Court and submit the quarrel to arbitration or adjudication. The state of things is that of which we have a bare trace in Roman and Hindu, but traces somewhat more abundant in Teutonic law ; you, having received an injury, so far availed yourself of the primitive natural remedy of forcible reprisals that you used it, with the sufferance or under the control of the law, to compel your adversary to come into Court. But, though this amount of correspondence is manifest, no further resemblance to the Roman Twelve Tables can be discovered amid the singular confusions of the Irish jurisprudence. The subject discussed in the great Code, the Senchus Mor, next after Distress is the law of 'Hostage-securities,' and it may certainly be asserted that this must have been an important branch of law amid a community perpetually belligerent like the ancient Irish. But in fact a great part of law is incidentally discussed in the Senchus Mor under the head of Distress, and it must on the whole be admitted that neither in that nor in any other Irish law-book is there any clear sign of designed classification. All we can say with confidence is—and this is an important proposition—that the Irish Brehon lawyers regarded the mode of bringing of a defendant into Court as the legal topic which rightfully and naturally took precedence of all others.

It appears to me that the key to these mysteries may be found in those Hindu law-books which have been more or less known to us under the extremely inappropriate name of Codes. One of them has been long accessible to English students through the translation of Sir William Jones, and this so-called Code of Manu is believed by orthodox Hindus to be the very collection of 'sacred laws' which Manu, 'whose powers were measureless,' declared to the 'divine sages' who approached him as he 'sat reclined with his attention fixed on one object.' But the sacred laws thus promulgated in no way answer to the modern conception of a Code. They are contained in a book which, among other things, is a treatise on the seen and unseen worlds, on the art of government, and on the various classes of Hindu society. Similarly the Christian Brehon laws are found mixed up with discussions on cosmogony and logic ; and the Roman Twelve Tables clearly consisted in some parts of ritual. The Code of Manu would in fact by itself suggest that Law, as a subject of conscious reflection, is the result of a gradual evolution. It was not at first dissociated from all sorts of propositions on matters which affect life in this world or the next. The Sanscritists of our day, as I have explained in the earlier chapters of this work, are not at all inclined to concede to the later Hindu law-books that vast antiquity which was once claimed for them. Following a theory of Professor Max Müller, they trace the rhythmical texts of the so-called Codes to collections of maxims expressed in language so concise as to fasten themselves on the memory, and finally to their fountain-head in the oldest literature of the Aryan race. But the law-books once framed appear to have undergone a further specialisation. Ritual, of which there are plain traces in the Roman Twelve Tables, has a compendium of rules entirely appropriated to itself in that remarkable record of another Italian community, the Eugubine Tables, which till the other day no man could read; and in the book of Narada, now open to the English reader, he will find a version of the 'sacred laws' of Manu in which Law proper has been isolated from other subjects, and is regarded very much in the same light in which it would be viewed by the author of a modern Code.

In the mediæval Digests of Hindu law, which are the actual sources of the law now administered in India, Narada is sometimes quoted as of almost equal authority with Manu. In point of fact, both Manu and Narada are entirely mythical, and the books called after their names are nothing more than compendia of the teaching of particular Hindu law-schools, formed more or less on the model of a *gens* or clan. Both these law-books pretend to an origin in the sacred laws declared by that Manu who took part in the creation of the world; but the author of the extant book, which purports to contain the whole teaching of Manu, quotes 'Manu' as a personage distinct from himself; and the preface to the book of Narada describes at length the process by which a supposed original Code of Manu was gradually specialised, until it became at last a treatise on civil law. Manu, says the writer, composed a work which, among other things, told of the creation of the world, spoke of the classification of beings in it, and gave the enumeration of the countries assigned to them, and it contained 100,000 *slokas*, legal texts or verses. Manu delivered it to Narada, who made the very reasonable remark, 'This book cannot be easily studied by human beings on account of its length.' He accordingly abridged it to 12,000 verses, and his disciple, Sumati, further abridged it to 4,000. It is only the gods, says the introduction, who read the original Code. Men read the second abridgment, since human capacity has been brought to this through the lessening of life.

The chief interest of the book of Narada, which has recently been translated into English by Dr. Julius Jölly, of Wurzburg, is that its writer is much more of a pure lawyer than the writer of Manu, and his work is much more nearly a work on law. Both of them were certainly Brahmans. The writer of Manu is intensely sacerdotal, and like earlier authorities, still contemplates the civil and earthly sanction as a supplement and aid to the spiritual penalty. On the other hand, the author of Narada depends almost wholly on the civil sanction, and his religious character shows itself chiefly in earnest and often very impressive exhortations to observance of the law and of the moral duties implicated with legal obligations. For my present purpose, however, I have only to point out that these Brahmanical code-makers, differing sensibly in some respects from one another, and each probably reflecting the doctrine of some venerated school, agree essentially in their conception of the order and contents of a Code. The classification of subjects which they follow may be seen by examining the eighth chapter of the Code of Manu in Sir William Jones's translation, and it is observed throughout the law-book of Narada. I will describe it from the last, since it is plainer in the more purely legal treatise. The following account of it will be found at page 6 of Dr. Jölly's version in *slokas* 16 to 20:—

'The eight constituent parts of a legal proceeding are the King, his Officer, the Assessors, the Law-book, the Accountant and Scribe, gold and fire for Ordeals, and water for refreshment.

'Recovery of a Debt, Deposits, Concerns among Partners, Abstraction of Gift, Breach of promised

Obedience, Non-payment of Wages, Sale without Ownership, Non-delivery of a Commodity sold, Rescission of Purchase, Breach of Order, Contests about Boundaries, the Duties of Man and Wife, the Law of Inheritance, Violence, Abuse and Assault, Gambling, Miscellaneous Disputes.

'These are the Eighteen Heads of Dispute.'

This distribution of subjects is, on the whole, rigorously observed throughout the treatise, except apparently in one particular. The mechanism of a Court of Justice and its procedure are first elaborately described. The King seats himself on the throne with the book of the law in his hands; but, though the justice described is throughout royal justice, the King is significantly directed to follow the opinion of his Chief Judge or Assessor. After a full account of judicature, the writer (subject to a remark which I will make presently) takes up the subject of Evidence, which, in his view, includes Ordeals; and then, having started with a summary of what we who live in the light of Bentham should call Adjective Law, he proceeds to divide the Substantive Law into eighteen branches, which he calls 'heads of dispute.' The order in which he discusses these is that in which he placed them in the passage which I quoted; with this exception, that the first head of dispute, Recovery of a Debt, is interpolated between Judicature and Evidence. This may be the result of a mere accidental disarrangement of the oldest compendia of Hindu law, but it is to be remarked that something like the same misplacing of 'recovery of debts' shows itself in the treatise of Manu, and it is conceivable that it may have been caused by the inherent difficulty of explaining adjective law without reference to substantive law, and that one 'head of dispute' may have been taken out of its place with the view of furnishing illustrations to the text-writer.

The principle and meaning of this ancient classification strike me as obvious. The compiler of Narada or his original makes the assumption that men do quarrel, and he sets forth the mode in which their quarrels may be adjudicated upon and settled without bloodshed or violence. The dominant notion present to his mind is not a Law, or a Right, or a Sanction, or the distinction between Positive and Natural Law, or between Persons and Things, but a Court of Justice. The great fact is that there now exists an alternative to private reprisals, a mode of stanching personal or hereditary blood-feuds other than slaughter or plunder. Hence in front of everything he places the description of a Court, of its mechanism, of its procedure, of its tests of alleged facts. Having thus begun with an account of the great institution which settles quarrels, he is led to distribute law according to the subject-matter of quarrels, according to the relations between human beings which do, as a fact, give rise to civil disputes. Thus Debt, Partnership, the Marital Relation, Inheritance, and Donation are considered as matters about which men at a certain point of civilisation do, as a fact, have differences, and the various rights and liabilities (as we should call them) to which they give rise, are set forth simply as guides towards determining the judgment which a Court of Justice should give when called upon to adjudicate on quarrels.

It appears to me that this explanation covers the whole of the problem suggested by the classification of subjects in the primitive Codes which I cited. They all seem to begin with Judicature, and to distribute substantive law into 'heads of dispute.' The Irish law never, indeed, gets farther than the initial steps of procedure. All the learning and ingenuity of the contributing Brehon lawyers are bestowed on defining the rules by which adversaries may be brought under the control of the institution, which the Roman and Hindu Codes assume to have been long since in existence and long since in active and regular operation. The testimony, however, to the early overshadowing importance of Judicature is all the more striking. As we have seen, the Roman, Frankish, and Hindu Codes also divide the subjects of the quarrels which are the materials for litigation into several branches; and, as to the order in which these 'heads of dispute' are taken up, it seems to me that it depends on their relative importance at the time when that order was fixed. I do not at all doubt that the arrangement is in a certain degree at haphazard, but it seems to me that there must have been a meaning in the prominence given to Deposits in the Roman and Hindu law, and in the prominence assigned to Thefts in the law both of the Romans and of the Salian Franks. At the reasons of the special importance of Deposits we can only guess, but I have already stated my opinion that the importance of Thefts belongs to a particular stage of economical and social advance. We can see the signs in Roman law of their dwindling importance, which is exactly what we should expect from the growth of population, from the rising value of land, from the greater plentifulness of capital, and from the freer multiplication of movable articles of use or luxury, and from their consequent relative cheapness. It is curious that, though Theft is not a specific Head of Dispute in the book of Narada, casual allusions to Thefts occur during the discussion of Deposits, possibly derived from an older state of the law.

The suggestion, then, which I offer is that the authority of the Court of Justice overshadowed all other ideas and considerations in the minds of these early code-makers, belonging to societies of the Aryan race so remote from one another and so unlike to one another. The evidence of this position does not solely arise from the probabilities or depend on inference from the construction of the ancient legal compendia. There is a whole literature, the Icelandic, which gives the most vivid impression of the power and majesty of Courts of Justice in an ancient society. It may almost be said that in the Iceland revealed to us by the labour and learning of Konrad Maurer there is no institution worth speaking of except the Court; all society is moulded round it and all ideas centre in it. It affects all literature, both poetry and prose. It is manifestly in the most intimate relation to every passage, incident, affection, and passion of life. And as the society depicted is in the highest degree bloody and violent, so long as it follows its natural bent, it becomes clear that it is not the Court as we understand it, but the Court standing before all men's sight as the alternative to forcible reprisals, and as the avenger of their victim, which has attained to this commanding altitude. We need not, moreover, go to historical records for the proof that this is a natural condition of men's minds. The phenomena can be reproduced, and are in fact not uncommonly reproduced in the country which has only lately emerged from the anarchy into which it fell long after the laws of Manu and Narada had ceased to be administered in it by tribunals which they describe. When a province hitherto specially ill-governed is annexed to British India, the first effect ordinarily is neither satisfaction nor discontent, neither the peaceable continuance of old usages nor the sudden adoption of new, but an extraordinary influx of litigation into the British Courts, which are always at once established. The fact occurs too uniformly, and at first sight is too inexplicable, not to have attracted notice, but it has generally been observed upon with regret, and, after a while, when there has been time to forget the original condition of the annexed territory, this new litigiousness is sometimes adduced to show that in exchanging native for British rule a community does not obtain an unmixed blessing. But the proper conclusion to draw is that already drawn in this paper, that Courts of Justice have an immense ascendency over men's minds and a singular attraction for their tastes, when they are first presented as a means of settling disputes which were either violently adjusted or slumbered because they could only be settled at prodigious risk.

Another phase in the history of Courts of Justice is instructively illustrated in the more settled parts of British India. The commands of the British Indian Government and of the British Indian legislature are far more implicitly obeyed than the commands of any previously existing authority in India, far more implicitly than the orders of the most powerful Mogul Emperors. The law is obeyed in India as uniformly as in England, but then it is much more consciously obeyed. At present (and for a long while to come it will probably be so) the fact of the existence of Courts of Justice regularly enforcing the law is constantly before the minds of the natives of India subject to their jurisdiction to a degree which we in this country can scarcely conceive. The law and the Court have an importance which may be measured by a circumstance related to me on good authority, that in many parts of India youths learn the texts of the Penal and Procedure Codes in daily lessons, as did the young Romans of Cicero's day the *cantilena* of the Twelve Tables. But with us, I need scarcely say, there is little conscious observance of legal rules. The law has so formed our habits and ideas that Courts of Justice are rarely needed to compel obedience to it, and thus they have apparently fallen into the background. It is only when the law happens to be uncertain, or when facts with which we are concerned happen to get unusually entangled, that most of us, who are not lawyers, ever come into contact with the administration of the law. No doubt the force which arms the law is still there; but it lies in reserve, in (so to speak) a compact and concentrated form, which enables it to keep out of sight. On the whole the effect of peace and civilisation is to diminish the conscious reverence of mankind for Courts of Justice, and the abiding sense of their importance.

We may believe that the impressiveness of the early Courts of Justice was in part created by what to a modern eye were their infirmities. It would seem that by their side the very practices long survived which it was their object to suppress. The tenderness of early judicial procedure to immemorial barbarism is shown by its partial recognition of the remedy which we call Distraint and the Germans 'self-help,' the remedy of private reprisals on the property of an adversary; and there is much significant evidence that the early tribunals had no power of directly enforcing their own decrees. The man who disobeyed the order of Court went out of the law; his kinsmen ceased to be responsible for his acts, and the kinsmen of those who injured him became also irresponsible; and thus he carried his life in his hand. We cannot then doubt that the violence and bloodshed which the law licensed under certain circumstances were generally rife during the infancy of Courts of Justice, and that their earliest service to mankind was to furnish an alternative to savagery, not to suppress it wholly. Their value and beneficence were therefore probably all the more conspicuous while as yet their power was imperfect and their operation irregular. But gradually, as the sovereign power of the State developed itself, and was more and more placed at the disposal of the tribunals, their decrees became inflexibly effectual.

Obedience to them came to be unhesitating and implicit, and a mass of habits and ideas were formed of which the centre and pivot is unquestioning observance of law. This formation of law-abiding habits, and the consequent banishment of the penal sanctions of law into the background, are the secret of many transformations of juridical theory. We have seen that the 'legal order' of the Roman Twelve Tables, testifying to the primitive importance of procedure, survived long after it had lost its meaning; but in the Roman State, always relatively well ordered and in the end the type of order and peace, the force which is the motive-power of law early retreated into the distance. The classification of the Roman Institutes, assigning the Law of Actions not to the first place but to the third and last, is one testimony to the formation of a habit of obedience to the law so confirmed as to be unconscious; but another and more striking piece of evidence is the rise of the conception of the Law of Nature, which is in truth law divorced from its penal sanctions. The retreat out of sight, if I may so speak, of the force which is the motive-power of law, has been even more complete in the modern than in the Roman world; partly because the decrees of Courts of Justice are everywhere inexorable, but also doubtless from the long ascendency of theories directly or indirectly descended from the Roman Jus Naturale. The great difficulty of the modern Analytical Jurists, Bentham and Austin, has been to recover from its hiding-place the force which gives its sanction to law. They had to show that it had not disappeared and could not disappear; but that it was only latent because it had been transformed into law-abiding habit. Even now their assertion, that it is everywhere present where there are Courts of Justice administering law, has to many the idea of a paradox—which it loses, I think, when their analysis is aided by history.

The primary distinction between the early and rude, and the modern and refined, classifications of legal rules, is that the Rules relating to Actions, to pleading and procedure, fall into a subordinate place and become, as Bentham called them, Adjective Law. So far as this the Roman Institutional writers had advanced, since they put the Law of Actions into the third and last compartment of their system. Nobody should know better than an Englishman that this is not an arrangement which easily and spontaneously suggests itself to the mind. So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms. It would even seem that civilised societies experience reversions towards this condition of thought. There are men still alive who recollect that the tendency towards active law-reform which was part of the great movement associated with the Reform Act of 1832, first showed itself in an energetic resuscitation of strictness in pleading, so that for many years the practical questions at issue were altogether thrown into obscurity by questions of the proper mode of stating them to the Courts. It was the very state of things which existed when the ancient Hundred Courts of the Germans were administering the rude Salic law. The effects of the 'New Rules of Pleading' wore away very slowly, and it was only the other day that the Judicature Acts, of which the full influence has not yet been felt, placed the Procedure of Courts of Justice on the footing which would naturally be given to it by a society which regards it only as Adjective Law.

The most modern classifiers, again, distribute law not with reference to the distinction between Persons and Things, but with reference to the differences between kinds of Rights. I stated before that the clear conception of a legal right is not ancient, or even Roman, but that it belongs distinctively to the modern world. Doubtless, before it can be realised, the sense of a Court of Justice as ever active, and as dominating the whole field of law, must have somewhat decayed. As regards one great class of Rights, those arising out of Contract and Delict, the Romans unquestionably mixed together the notions of legal Right and legal Duty. They considered the parties as bound together by a *vinculum juris*, a bond or chain of law, and 'Obligation,' which is the name for this chain, signified rights as well as duties; the right, for example, to have a debt paid as well as the duty of paying it. As I have said elsewhere, 'the Romans kept, in fact, the entire picture of the "legal chain" before their eyes, and regarded one end of it no more and no less than the other.' But it was the Court of Justice which had welded this chain, and the explanation of this and other blended ideas which we can detect in Roman legal phraseology is, I presume, that the dominancy of the Court of Justice over all legal notions still continued to influence the Roman view of law. Although, however, the authors of the Roman Institutional manuals did not invent, and could not have invented, arrangements of law based on classification of Rights, they did, as we have seen, attain to the conception of law as something distinct from Procedure, and they did conceive it as distributable into the Law of Persons and the Law of Things. The exact relation of these two departments to one another has been keenly disputed by modern writers, and it cannot be conveniently considered here; but anybody who can bring home to himself the ancient ideas of law on which I have sought to throw light may, perhaps, convince himself that the conception of a Law of Things, at all events, was a great achievement in mental abstraction ; and that it must have been a man of legal genius who first discerned that Law might be thought of and set forth apart from the Courts of Justice which administered it on the one hand, and apart from the classes of persons to whom they administered it on the other.

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